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**THE IMPACT OF CLIMATE CHANGE UPON HUMAN RIGHTS:
TOWARDS A HUMAN RIGHTS-BASED APPROACH**

RELATORE

**Chiar.mo Prof.
Pietro Pustorino**

CANDIDATO

**Fiammetta Cardillo
Matr. 139413**

CORRELATORE

**Chiar.mo Prof.
Roberto Virzo**

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There are no human rights on a dead planet

Kumi Naidoo

Introduction.....	6
Chapter I Addressing Climate Change.....	13
1.1 An overview of the phenomenon.....	13
1.2 The Problems of Building a Legal Framework: Intersections of Law.....	16
1.3 Relevant International legal framework.....	20
a) Foreword.....	20
b) The Intergovernmental Panel on Climate Change.....	21
c) The United Nation Framework Convention on Climate Change and the Kyoto Protocol.....	24
1.3 Existing Response Measures to Climate Change: Mitigation and Adaptation.....	29
Chapter II Implications on the Enjoyment of Human Rights.....	32
2.1 Foreword.....	32
2.2 The Inuit petition and the Male’ Declaration: towards a concretization of the linkage between Climate Change and Human Rights.....	36
2.3 Human Rights Law and its role in the Environmental Protection.....	39
2.4 Introducing the analysis of climate-related impacts over the different Human Rights.....	45
Part A Directly Involved Human Rights: Impact on Life and Health.....	47
a) Climate Change impacts on the Right to Life.....	47
i) <i>Portillo Càceres v Paraguay case</i>	50
ii) <i>Teitiota v New Zealand case</i>	53
b) Climate Change impacts on the Right to Health.....	57
Part B Indirectly involved Human Rights: Impact on Livelihoods and Natural Resources.....	61
a) Climate Change impacts on the Right Adequate to Food.....	61
b) Climate Change impacts on the Right to Water.....	65
c) Climate Change impacts on the Right Adequate to Housing.....	69
Part C Indirectly involved Human Rights: Impact on Development and Self-Determination.....	72
a) Climate Change threatens the Right to Development.....	72
b) Climate Change threatens the Right to Self-Determination.....	77

Chapter III Human Rights Obligations relating to Climate Change.....	82
Part A Recognition of Human Rights Obligations in the context of Climate Change.....	82
A.1 Attributability to States of Human Rights violations due to Climate Change: Human Rights violations in a strict legal sense?.....	82
A.1.1 The Urgenda Climate Case.....	86
A.2 Difficulties to Hold a State Accountable: the problem of allocating Responsibilities.....	91
A.3 States Duties to Respect, to Protect and to Fulfill Human Rights with respect to Climate Change.....	94
Part B Human Rights Obligations relating to Climate Change at the International level.....	102
B.1 The Challenge of Extraterritoriality and the importance of International Cooperation.....	102
B.2 The OHCHR’s system of International-level Human Rights Obligations in the context of Climate Change.....	108
Part C Human Rights Obligations relating to Climate Change at the National level.....	111
C.1 Foreword.....	111
C.2 Procedural Obligations.....	113
C.3 Substantive Obligations.....	117
C.4 The OHCHR’s system of National-level Human Rights Obligations in the context of Climate Change.....	122
Chapter IV Outlining a Human Rights-Based Approach to Climate Change.....	125
4.1 Existing Framework.....	125
4.2 A Newly shaped Approach to Climate Change: a Human Rights-Based Approach.....	133
4.3 Addressing a Human Rights-Based Approach to Climate Change: the role of States’ Responsibility and Accountability.....	136
4.4 The Benefits linked to the adoption of a Human Rights-Based Approach To Climate Change.....	141
4.5 Objectives to Pursue and Final Remarks.....	144

CONCLUSION.....	151
BIBLIOGRAPHY.....	154
BOOKS AND JOURNALS.....	154
TREATIES AND CONVENTIONS.....	157
UN DOCUMENTS.....	158
COURTS' DECISIONS.....	162
MISCELLANEOUS.....	163

INTRODUCTION

Climate change is not a distant reality, but is already here, today. Human-induced global warming and extreme weather events connected to climate change represent the biggest, most acutely felt threat to both the environment and the human race that the world has ever known. In the past 20 years, *anthropogenic* climate change has caused at least 7,348 major disasters between 2000 and 2019, taking the lives of millions and affecting almost 4.2 billion people worldwide.¹ The Intergovernmental Panel on Climate Change (IPCC) has provided through its work a new awareness on the matter, demonstrating how the effects of climate change will increasingly and negatively continue to affect the lives of billions people as well as the ecosystems, natural resources and infrastructures which they are strictly dependent on.² In fact, due to the unprecedented increases in Greenhouse Gases (GHG) emissions which are at the basis of the *anthropogenic* climate change and which represent accordingly the failure of States and the International Community as a whole to build effective and sustainable climate policies, the climate balance of the planet has resulted extremely compromised at the point to cause unnatural disasters and extreme weather events, which in turn are able to threaten human lives and safety both directly through the exposure of people to floods, droughts, extreme heat, wildfires etc. and indirectly by causing a gradual environmental degradation which affects the availability of natural and other key resources for the human life such as clean water, availability of food, livelihoods and housing. The consequence is a deep and severe impact on the enjoyment of many human rights, as protected under international Human Rights Treaties as well as under regional Conventions and national legislations. The purpose of this paper is to provide for a global knowledge of the complex mechanisms and implications connecting human rights to climate change, relying on the new-born framework of agreements and conventions lying behind the today's existing perception of the relationship between these two, only

¹ UN Humanitarian, "Why the climate crisis is a humanitarian emergency", January 27th, 2021.

² United Nations Environmental Program (UNEP) Report "*Human Rights and Climate Change*" in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

apparently, different worlds. Anyway, this paper won't just stop at the surface, but it will try to be more ambitious by providing for a deeper analysis of the facts and events as occurred during the last 15 years, in which the link between human rights and climate change has evolved from being just a mere unpopular alarm to being not only a concrete fact, explicitly recognized with the solemnity of an international agreement, but a strategy in itself to be taken into account by the international community and the civil society in order to address the many challenges that the quintessential problem of climate change will entail in the future and is already entailing today. The use of human rights as both the goal and the strategy to reach the goal has been defined as a "human rights-based approach to climate change" by the many scholars and Human Rights Bodies who contributed with their work to the creation of the fragile albeit ambitious framework existing today behind this complex yet necessary relationship between human rights and climate change. This paper thus represents and reflects at the same time the gradual process which brought to the ascent of a human rights-based approach as a concrete idea discussed at the international level, albeit not concretely put in practice. As a consequence, the end of this elaborate is actually only "the end of the beginning",³ as it leaves the door open by providing for recommendations and objectives put forward by international entities and human rights experts as advices to be listened to by the international community in order to consider them in its future decisions on the matter. More in detail, Chapter I will introduce the elaborate by providing for a necessary analysis of the phenomenon of climate change *per se* considered, explaining which is the scientific basis lying at the background of the issue concerning the effects of this phenomenon over human rights. Moreover, it will describe which are the most important mechanisms addressing climate change at the international level, and namely the Intergovernmental Panel on Climate Change (IPCC), a scientific forum of the UN created with the aim of providing policymakers with the best possible information concerning climate change, and the United Nation Framework Convention on Climate Change (UNFCCC), the

³ Churchill, W., Speech at the Lord Mayor's Day Luncheon at the Mansion House (London, 9 November 1942).

main International Treaty on climate change, which provides, through the creation of Protocols such as the Kyoto one, for the application to the States Parties of legal obligations binding States Parties to take specific actions or behaviors with respect to climate change, concerning principally the establishment of targets and limits to the emission of greenhouse gases. The UNFCCC is important as well for two other aspects: the first concerns the international cooperation that it allows its State Parties to exploit through the mechanism of the Conferences of the Parties (COP's), as it represents the way through which climate negotiations are taken for the purpose of giving life to international climate agreements. International agreements such as the Cancún Agreements and the Paris Agreements have represented key steps taken towards the concretization of the necessity to take urgent action against climate change for the welfare of present and future generations. The second aspect regards the existence of UNFCCC's provisions requiring State Parties to adopt in their programmes and climate policies specific measures aimed at mitigating and adapting to climate change, for the purpose of calling on the attention of all policymakers the reality of a threat which needs to be effectively addressed at all stages and levels. A description of how these important climate instruments are composed and how they operate with respect to climate change will be functional to reconstruct the main events who led to the recognition of the linkage between human rights and climate change, officialized for the first time in an international decision of a UN body signed in Cancún, Mexico, and resulting from the 16th Conference of the Parties (COP16) to the UNFCCC. The IPCC and UNFCCC will be present during all the way towards the concretization of a human rights-based approach, and will be as well, as the case of the UNFCCC with regard to its Conferences of the Parties, the main addressee of the suggestions on how to put in practice human rights-based approaches to climate change in the future climate negotiations. After this illustrative analysis provided in Chapter I, Chapter II will then focus on describing more in detail in what consist the relationship between human rights and climate change, and which are exactly the interferences of the latter with the enjoyment of human rights. For this purpose, the Chapter will start its analysis from the roots of this complex relationship, and

namely from the Inuit Petition and the Male' Declaration. These two important acts represent the very first attempts to call on the attention of the international community to the many threats and dangers to the enjoyment of human rights that climate change imply, and for this reason they will be successively defined as 'innovative'. Anyway, the identification of a causal relationship between climate change and human rights is not the only innovative aspect introduced, as these acts reflected in particular the idea, which would have been realized only in a second moment, that the developing countries and vulnerable communities are actually the ones suffering the most for the consequences of the *anthropogenic* climate change that they contributed the less to create; this idea introduced the concern regarding the *injustice* of climate change as a consequence of the negligent behavior of the international community, who has chosen for too many years to ignore the effects which would have resulted from their selfish and polluting actions. The Inuit Petition and the Male' Declaration didn't get the attention they requested, but the latter, by formally requesting the UN Bodies to conduct an analytical study on the alleged relationship, gave life to an *impetus* in the UN and the whole international community to concretely start giving the issue the concern and the attention it deserved. These are the premises at the basis of the successive analysis, provided in Chapter II, of the single impacts triggered by climate change on each of the most affected human rights, and in particular on the rights to life, health, food, water and adequate housing. Some of these rights are directly impacted by the extreme weather events and natural disasters resulting from climate change, such as the right to life and health. The other rights (food, water, housing) are only indirectly affected by these events, and in their undermining it's possible and necessary to find, in turn, another threat to the rights to life and health, which are more general and comprehensive and because of this reason are perceived by the international community with a major concern. With respect to the indirect impacts of climate change, an analysis is provided also for what concerns the way climate change affects the rights to development and self-determination. The right to development consists in the achievement of the economic, social and political processes aimed at improving the well-being of all people on the basis of their

participation in development, and therefore it's realization is only concretely possible when the full realization of all the other rights and fundamental freedoms is possible. As a consequence, by posing threats to the human rights of all people, climate change indirectly and existentially impacts the people's enjoyment of their right to development. At the same time, the right to self-determination, a *jus cogens* norm to which no derogation is permitted, can be seen as a conglomerate right which, in order to be realized, requires the full enjoyment of many subsidiary human rights including the economic, social and cultural rights and in particular the rights to life, to an adequate standard of living, to adequate food, to water, housing and health.⁴ Thus, undermining one of these rights means undermining the right to self-determination in itself. The analysis provided will evidence how these two important rights to development and self-determination both contribute to confer to all the human rights previously observed an additional value, and therefore are functional to help adopting a vision of the whole analysis as an *unicum* of interrelated and indivisible rights which climate change has the potential to affect, perhaps with different intensities, but which require in any case, due to this indivisibility and interrelation existing among them, to be addressed in the same equal way. Anyway, as will be observed in Chapter III, it's difficult at the practical level to consider the negative impacts of climate change on the enjoyment of all these rights as human rights violations in a strict legal sense, due to the fact that it would be problematic to identify a State which could be easily held responsible for such violations. Chapter III will explain that this practical difficulty derives from the nature of climate change as being a quintessential phenomenon which is based on GHG emissions: it's concretely impossible to distinguish whether the emissions causing climate change came from a certain State rather than another. As a consequence, people suffering for the effects of climate change with a certain severity cannot claim that a given State, by not addressing those effects, has failed to comply with its human rights obligations thus causing a violation of their human rights.⁵ In fact,

⁴“Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati”, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

⁵ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

despite there have been attempts to find mechanisms for distinguishing the single emissions deriving from single States, once in the atmosphere, greenhouse gases are the result of a “cumulative effect” coming from all the emissions of all the emitting States, as a result of the exercise of all their jurisdictions. This could be another example of the *injustice* connected to climate change, as it is historically known that developed countries in particular, such as the United States or China, and together as well with Europe, are responsible alone for more than a half of the current GHG levels in the atmosphere, while, on the other side, the developing and most vulnerable countries, which have historically emitted GHG in lower amounts, are the ones already experiencing the worst consequences of climate change. Because of these reasons, it would be problematic to allocate responsibilities among States for the many violations of human rights triggered by climate change. And these are also the reasons lying at the basis of the many difficulties to build a framework of human rights obligations concretely applicable to States in order to protect individuals against climate change. These practical difficulties to find a State accountable represent one of the main challenges with respect to the recognition of human rights violations due to climate change, but many scholars and scientists are already working on technical tools which could be used in order to distinguish emissions coming from the different States, or other methods for allocating responsibilities. Another problem to consider with respect to the possibility to claim that climate change has caused the violation of human rights concerns the fact that the human rights framework is contemplated as being normally applied within the territory of a State and within its jurisdiction, including, according to the definition of the notion of jurisdiction, those territories where a State anyway exercises an effective control. On the other side, due to the complex cumulative effects lying at its basis, climate change is by nature a transboundary phenomenon who necessarily require an extraterritorial application of an hypothetical framework of human rights norms also beyond the extraterritorial and jurisdictional control of a State, in order to be effectively addressed. Despite some attempts to identify extraterritorial applications of human rights obligations in this sense do exist in the human rights system, and in particular in the interpretation provided by the Committee on

Economic, Social and Cultural Rights of the duty of international cooperation contained in the International Covenants on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), it will be one of the major tasks of future international negotiations to identify an encompass to the problem of extraterritoriality; in this context, the newborn *climate justice*, a new case law on climate change who focus on addressing it not only as an environmental concern but also as a political and ethical one, will hopefully help realizing this goal. Overpassing the difficulties concerning the allocation of responsibilities and extraterritoriality would provide several benefits, as stressed by many UN Human Rights bodies such as the Human Rights Council and in particular the Office of the High Commissioner on Human Rights (OHCHR), who found in this regard that despite the problems of responsibility and extraterritoriality, who should be addressed at the international level through the future negotiations, the application to States of human rights obligations in the field of climate change could concretely help building a framework of human rights duties and obligations applicable both at the national and international level against the threat that climate change embodies for the human race, and the application of the three main traditional human rights duties to respect, to protect and to fulfill human rights to the context of climate change would consent to exploit the human rights framework at the maximum level of its application to the system of climate change. All these steps will be functional to push the international community towards the adoption of a human rights-based approach to climate change, which, as reported in Chapter IV, would provide many benefits both at the national and international level, and in particular for what concerns not only the creation of a framework of duties and obligations that could make the protection of human rights effective against climate change, but also for what concerns the climate policy-making processes, as such an approach would oblige policymakers to pay attention to human rights at every stage of the making-processes, focusing as well on the need to provide individuals with the full, meaningful and effective participation to all the policies and programmes concerning climate change. Only by adopting such approach, it will be possible to give individuals and vulnerable communities the attention they

deserve, and to provide future generations a better sustainable future. This will be the most important task of the 21st century, and the main priority for everyone, everywhere.⁶

CHAPTER I

Addressing Climate Change

1.1 An Overview of the Phenomenon

In the scientific community and in the recent global debate there is a general agreement- the climate is changing. The Earth's climate has changed several times - even drastically - during the planet's life, with events switching from ice ages to long periods of drought. Nevertheless, the kind of changes that are being reported nowadays can be distinguished from the previous ones because of the rapidity at which they occur.⁷ Starting from the Industrial Revolution in the 18th century, the temperature and in particular the global warming has significantly increased at the point that these last years have been the warmest in terms of average world's temperature of the last centuries. According to the scientific consensus of any national or international standing, human activity has to be considered the main responsible for Climate Change. In fact, despite the phenomenon in itself is also attributable to natural processes and factors (such as changes in the Sun's intensity or Volcanic eruptions), recently the major interference in the natural climate change process has been due to human's emissions of greenhouse gases. Gases such as Carbon Dioxide (CO₂), Methane and Nitrous Oxide,⁸ released through the burning of fossil fuels, together with other emissions coming from agriculture, deforestation and industrial processes,

⁶ UN Secretary-General Antonio Guterres at Columbia University, 2, December 2020.

⁷ Environmental Protection Agency (EPA) website article: What is Climate Change? available at the website <https://www.epa.ie/climate/communicatingclimatescience/whatisclimatechange/>

⁸ US EPA (15 September 2020). "Overview of Greenhouse Gases". Retrieved 15 September 2020.

are changing the composition of the Earth's atmosphere provoking an alteration of the so called "Greenhouse effect". Every time the sun's heat reaches the atmosphere, part of it is reflected back to the space and the rest is re-radiated as heat: the greenhouse gases absorb part of the heat reflecting it in all directions and warming the Earth.⁹ However, the burning protraction of fossil fuels during the past centuries has caused an increase in the atmosphere of heat-trapping greenhouse gases concentrations, which by not letting the heat escape to the space, are progressively causing an overheating and a general alteration of the average temperature of the planet. The consequences are clearly evident considering that in the last 100 years the temperature has increased by 0.8 centigrade degrees (C°) compared to the pre-industrial levels. An increase in the amount of greenhouse gases in the atmosphere means there is also a higher possibility that catastrophes and extreme climate change events occur: on average, the planet will become warmer and this will probably lead to phenomena such as desertification and wildfires, besides the fact that warmer conditions will significantly contribute to melting the permafrost, with the side effect of warming the ocean and raising sea levels. An increase in natural disasters i.e. earthquakes, tsunamis, hurricanes and volcano eruptions is also more likely to happen, according to the scientific consensus. As stated by the International Law Commission (ILC), a "disaster" means a "calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage thereby seriously disrupting the functioning of society".¹⁰ The Intergovernmental Panel on Climate Change (IPCC), which is an intergovernmental body of the UN aimed at publishing periodical reports about climate change and its components and impacts, has issued a series of reports that foresee a general increase in these impacts as long as the global warming continues or exceeds the 1.5 °C. In this regard, the contracting parties of the Paris Agreement - the most recent international legally binding treaty on climate change - , agreed on keeping the

⁹ Global Climate Change, Nasa, "The Causes of Climate Change", available at the website <https://climate.nasa.gov/causes/>.

¹⁰ International Law Commission (ILC) Draft Articles on the protection of persons in the event of disasters, Article 3, 2016.

level of warming “well below 2.0 °C above pre-industrial levels and pursuing efforts to limit (by reducing the greenhouse emissions) the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this will significantly reduce the risks and impacts of climate change”.¹¹ However, as the Climate Action Tracker¹² enforced, “under current pledges, the world will warm by 2.8 °C by the end of the century, close to twice the limit they agreed in Paris. Governments are even further from the Paris temperature limit in terms of their real-world action, which would see the temperature rise by 3 °C”.¹³ It should be added that despite these efforts being successful, some effects including the rising of sea level and ocean temperature would in any case continue for centuries.¹⁴ In one of its Special Reports of 2012, called “*Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*”,¹⁵ the IPCC shows how the brutality of the impacts of extreme or non-extreme wheatear events related to climate change strictly depends on the degree of vulnerability and exposure to such climate events. Among the risks to which people are exposed there are joblessness, landlessness, food shortage and loss of access to common property resources. Moreover, there are different levels of vulnerability to climate events depending on the ethnicity, the socio-economic class, the gender, the age the migration and housing tenure.¹⁶ As it’s easy to notice, the extent of the climate change problem is more broad and complex than one may think, as it has the potential to affect many sectors of social life creating difficult situations in terms of loss of lives and environmental degradation; it started from here the necessity to develop an international legal framework to address climate change and its effects on the contemporary world, although differentiated in terms of extent of damages depending on the impacted area. A legally binding framework is the key

¹¹ Paris Agreement, Article 2.1 letter (a).

¹² The Climate Action Tracker (CAT) is an independent scientific analysis made by two research organizations since 2009, which is aimed at tracking progresses of climate change in the light of the goals settled by the Paris Agreement to hold the warming well below 2°C and pursue efforts to limit warming to 1.5°C.

¹³ Climate Action Tracker (2019), Warming projections global update, December 2019 (Report).

¹⁴ IPCC SR15 2018 pp. 49-91, “*Global warming of 1.5°C*, Special Report.

¹⁵ IPCC Special Report (2012) “*Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*”

¹⁶ (Ibid.) IPCC Special Report (2012) “*Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation*”.

for States to take concrete and effective actions in order to mitigate climate change negative impacts in an historical moment in which “the needs of future generations are inadequately represented by the current climate policy making”.¹⁷ Today, the existing legal framework still lacks concrete dispositions in order to regulate many of the climate change-related impacts, but yet it represents only the beginning of a new field of law which will become necessary to address in an imminent future. In the next paragraphs, an analysis of which is the already existing international legal framework will be provided.

1.2 The Problems of Building a Legal Framework:

Intersections of Law

At present, a branch of law which is specifically aimed at covering all the legal implications of climate change does not exist.¹⁸ In fact, trying to regulate all the climate change aspects under any legal structure would be one of the greatest challenges in the field of law, due to the interdisciplinary nature of climate change and its disproportionated impacts on several geographical areas of the world.¹⁹ Therefore, in order to be just dealt with, climate change needs a combination of political, legal and scientific tools. From the legal point of view, climate change has given life to numerous concepts and principles of international law, and in particular the *principle of common but differentiated responsibilities*,²⁰ the notion of *common concern of humankind*²¹ and the necessity to provide the most

¹⁷ Mazmanian, D. A., J. Jurewitz, and H. T. Nelson. 2013. A governing framework for climate change adaptation in the built environment. *Ecology and Society* 18(4): 56. <http://dx.doi.org/10.5751/ES-05976-180456>

¹⁸ Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Chapter I: “*Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene*” pp. 29-94.

¹⁹ (Ibid.) Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting, Climate Change: International Law and Global Governance, Volume I

²⁰ United Framework Convention on Climate Change (UNFCCC), Article 3, para. 1.

²¹ GA Resolution 43/53 of 6 December 1988 (A/RES/43/53). The concept of a “common concern of humankind”, derives from the older concept of “common heritage of humankind” as firstly used in International Treaties on the Law of the Sea.

vulnerable with an effective protection, which have been conceptualized within the context of the United Nations in order to make States realize the extent of climate change implications and, as a consequence, the way in which they should act in order to address it. These principles will be further analyzed in the next paragraphs and will continue to be considered during all the way towards the affirmation of a relationship between climate change and human rights, addressed more in depth in next Chapters. When assessing climate change law, it is first relevant to distinguish between two dimensions: procedural and substantive. The procedural dimension includes “the right to information, the right to participate in decision-making and the right of access to justice, despite it is not clear whether and under what conditions an individual, an organization or a State has the right to commence action”.²² Another main interrogative when dealing with the procedural dimension of climate change is about who would be the proper addressee of climate change-related claims in case of damages.²³ The today’s existing relevant legal framework is working on an answer and is constantly updating and negotiating on what would be the best tools for addressing this legal climate change-related topics. For what concerns the substantive dimension of climate change law, on the other side, it is first necessary to point out that due to its interdisciplinary nature, climate change has an enormous number of ramifications in many different areas, such as the economic, legal, scientific and political ones etc. For instance, climate change, biodiversity loss, natural resources, the international trade, human rights law, are all subjects which are strictly interrelated and connected within each other’s. Because of these reasons, it is possible to speak about climate change “intersections”, meaning that in order to be addressed climate change requires the intervention of many different disciplines coming from different fields apart from the environmental one. Looking from the legal prospective, it is also possible to speak about “intersections of law”, as climate change “permeates the law in many ways”,²⁴ thus creating intersections in many different but interrelated branches of law,

²² (Ibid.) Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting, *Climate Change: International Law and Global Governance*, Volume I

²³ (Ibid.)

²⁴ (Ibid.)

starting from environmental law up to human rights law, humanitarian law and administrative law and many others. This is mainly because climate change is a complicated phenomenon involved in many aspects of law, as its effects and impacts eventually imply the application of norms coming from many different branches of law. For instance, through the occurrence of extreme-weather events, climate change has negative impacts on the environment and ecosystems, consequently threatening the human rights of those people who live in such ecosystems: this requires States to act both under environmental law (in order to face environmental degradation), and under human rights law (in order to protect the human rights of those suffering due to the environmental degradation). Therefore, it is possible to affirm that climate change law finally consists in a legal cumulation between the legal provisions which protect the climate in itself, and the legal provisions aimed at protecting the climate against the negative effects of climate change. When dealing with climate change law, a relevant issue regards the demarcation in terms of binding nature between hard law and soft law: many national and international law sources are obligatory while others are not. In general, despite it has been pointed out that “the lack of enforceable legal obligations which are globally applicable, is one of the “major deficiencies”²⁵ and challenges for current climate change negotiations,²⁶ there’s still a need for a reflection; in fact, under a given prospective, the use of “soft law” instruments for addressing climate change does not seem to be so inadequate as far as one considers that their non-binding nature makes these instruments very adaptable and flexible in a context which desperately calls for a certain elasticity and a certain space to be given to States in order to take appropriate measures, especially considering that climate change has several implications in every field (economic, political, social etc.) that States need to keep under control. On another prospective, though, and this is the prevailing opinion, it appears quite difficult to believe that without hard law instruments States could act responsibly in a context like the climate change one, in which there are too many interests at stake, especially economic and political ones. Thus, it is for these reasons that

²⁵ Spier, Jaap (2012:49) “*Shaping the law for Global Crises*”, Den Haag, Eleven International Publishing.

²⁶ (Ibid.) *Climate Change: International Law and Global Governance*, Volume I

the majority of climate change law scholars, considering also the extent of the climate problem, insists on the necessity of a binding legal framework which would guide States and their responsibilities where they would be unable to do it. This will be particularly relevant with regard to the climate change interferences with human rights, as will be further observed in the next paragraphs. Apart from these considerations, it is possible to affirm that the situation of uncertainty which reigns today in the climate change context is the result of a global climate change governance which still appears extremely fragmented due to the absence of a universal climate change regime; this makes international climate change law and different climate change-related regimes extremely complex, as it is possible to realize also by observing and studying the many UN conventions, the international human rights regime, the multilateral environmental agreements (MEAs) and in general all the international legal instruments that directly or indirectly deal with climate change.²⁷ This general situation of uncertainty, from a certain perspective, shows that the today's existing international legal climate change regime is nothing but a creature of international law, which since the dawn of the United Nations bodies aimed at addressing climate change, has been growing up and developing at a certain rapidity: there are several international agreements (multilateral, bilateral, regional) which have been entering into force and by extension, several international customary rules have been established, as evidence that there is a general practice accepted by law.²⁸ As a consequence, and following the generally accepted assumption that there is an actual need of hard law instruments in this new legal discipline, these international agreements are binding among the State parties who have given them their consent by ratification or accession (in case the State was not an original signatory of the treaty). In conclusion, it is clear that climate change is becoming an issue of growing concern day by day, as it becomes more evident the necessity to address it for guaranteeing the welfare of present and future generations; that's why the international legal panorama addressing climate change and the environment is evolving and will continue to evolve in a way or another from a status of general

²⁷ (Ibid.) Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting, *Climate Change: International Law and Global Governance*, Volume I

²⁸ (Ibid.)

fragmentation into a more hopefully precise legal framework. In the meantime, we will analyze in the next paragraphs which is, at present, the meager but ambitious existing legal framework.

1.3 Relevant International Legal Framework

a) Foreword

In the next paragraphs, a general description of the main international actors operating within the context of the United Nations in the field of climate change will be provided. For the purpose of this paper, it would be relevant to observe that being a relatively new discipline, climate change law, as discussed in the previous paragraph, is not addressed by many bodies of international law, as the main actors within the international community who have been dealing with climate change since the very beginning are mainly NGO's and other UN and non-UN environmental organizations. Instead, in the late 80's and early 90's, in addition to the already existing bodies operating in the environmental context,²⁹ new specialized bodies aimed at addressing climate change started to appear in the international panorama within the context of the UN, as a demonstration of a new perception of climate change as a problem who needs to be solved. In this regard, the already provided explanation of the scientific components lying behind the complex phenomenon of climate change has been functional to understand which is the operative field of the first main actor that will be observed, namely the Intergovernmental Panel on Climate Change (IPCC), which was established within the UN climate framework in 1988 with a Resolution of the UN General Assembly n. 43/53. The second main protagonist of this analysis is the United Nations Framework Convention on Climate Change (UNFCCC), the main International Treaty existing in the field of climate change, adopted in

²⁹ See i.e. the United Nations Environment Programme (UNEP) or the Commission on Sustainable Development (CSD).

1990 with the UN General Assembly Resolution n.45/212. Understanding the UNFCCC's system and principles will be particularly relevant for the purpose of understanding which have been the most relevant events connected to the recognition of the relationship existing between human rights and climate change and which are the mechanisms who could better address this relationship in the future.

b) The Intergovernmental Panel on Climate Change

In the late 80's, the international agenda was already filled with the topic of climate change. In 1988, the UN General Assembly (UNGA) issued a Resolution on the "Protection of Global Climate for Present and Future Generations of Mankind",³⁰ referring to climate change as a "common concern of humankind"³¹ and the same year, following the Resolution, the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) established the Intergovernmental Panel on Climate Change (IPCC), an intergovernmental body of the UN, which is the principal international organism for the assessment of climate change. The IPCC was created to "provide policymakers with regular scientific assessments on climate change, its implications and potential future risks, as well as to put forward adaptation and mitigation options".³² The Panel's main activity is to produce Assessment Reports that cover the technical, scientific and socio-economic information which is necessary in order to understand the scientific basis of the risks coming from human-induced climate change, its negative impacts and the options for adaptation and mitigation.³³ The Assessment Reports are redacted by a team

³⁰ "The International Climate Change Legal and Institutional Framework: An Overview", article by David Freestone.

³¹ GA Resolution 43/53 of 6 December 1988 (A/RES/43/53).

³² IPCC home page, available at the official IPCC website "<https://www.ipcc.ch>".

³³ IPCC. "Principles Governing IPCC Work" (PDF). Approved 1–3 October 1998, last amended 14–18 October 2013. Retrieved 22 February 2019.

of relevant researchers as elected by a Bureau,³⁴ but the participation at every stage of the drafting process is allowed as well to expert reviewers nominated by the governments and to IPCC observer organizations in order to formulate comments on the issues taken under consideration in the Reports.³⁵ The Assessment Reports include also Special Reports, which are Reports who focus on specific technical topics agreed by the Panel's member governments,³⁶ as well as Methodology Reports which are aimed at providing guidelines for the preparation of greenhouse gas inventories.³⁷ The Panel does not in itself conduct new researches or monitor climate related data, but instead its assessments are mainly based on scientific literature published after a peer review, as well as on the major global institutions' reports.³⁸ Anyway, the Reports could also take into account non-peer-reviewed sources ("gray literature") such as reports of non-governmental organizations and journals, once ensured that they are of good quality.³⁹ The outcomes of the Assessment Reports are at the basis and contribute to the work of important international agreements such as the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol, an international treaty aimed at operationalizing the Convention in the field of global warming. The IPCC has adopted in its system a document concerning the "Principles Governing the IPCC work", which regulates the organization of the Panel, and whose main objective is to assess the risks connected to the anthropogenic climate change, its negative potential impacts and the possible options for preventing them.⁴⁰ According to this document, the reports produced by the IPCC should be neutral with respect to the governments' climate policies, although they could need to be objectively adapted to scientific, technical and socio-economic factors which are relevant for the application of particular

³⁴ The Bureau is elected by the Panel, and is composed by 34 members including Vice-Chairs, Co-Chairs of Working Groups and the Task Force, and Vice-Chairs of the Working Groups. Its main aim is to provide guidance to the Panel on the scientific and technical aspects of its work. Wikipedia, IPCC.

³⁵ Wikipedia, IPCC.

³⁶ For instance, in 2018 the IPCC published a Special Report on the specific topic of "Global Warming of 1.5 C".

³⁷ (Ibid.) IPCC website, Reports.

³⁸ Chapter 2: Evaluation of IPCC's Assessment Processes, in *Climate Change Assessments, Review of the Processes & Procedures of the IPCC*, InterAcademy Council, October 2010.

³⁹ "Sources for IPCC Reports, 32nd Session, 2010" pp. 6–7. Retrieved 9 August 2019.

⁴⁰ IPCC. "*Principles Governing IPCC Work*", Approved 1–3 October 1998, last amended 14–18 October 2013. Retrieved 22 February 2019.

policies.⁴¹ This means basically that these Reports should be taken under consideration by policymakers, even though they lack the potentiality to prevent policymakers to consider other factors which may eventually be in contrast with the outcomes of such reports. The IPCC consists, inter alia, of three main Work Groups. Working Group I is aimed at assessing the scientific aspects of the system of climate change, while the Working Group II focuses on the vulnerability of the natural as well as socio-economic systems with respect to climate change, taking into account as well which are the negative and positive consequences of climate change and which the options for adapting to it. Working Group III, on the other hand, is aimed at assessing options for mitigating climate change by reducing or preventing the emission of GHG and by enhancing activities aimed at removing GHG from the atmosphere. WG III also analyses which are the costs and benefits of the different approaches to mitigation taking in consideration the availability of the instruments and the policy measures.⁴² The IPCC has become one of the main international references when it comes about climate change, and this is mainly because it provides governments and international organizations with the most valuable advice. In fact, by assessing objectively the available scientific knowledge and the uncertainty in the field of climate change, the IPCC dispenses the world with the best possible evidence of climate change negative impacts. Following these premises, it's possible to affirm that the Panel occupies also a central role in the policy reform and political decision-making process in the field of climate change.⁴³ Indeed, thanks to its scientific and intergovernmental nature, the IPCC represents an essential opportunity to provide decision-makers a meticulous and balanced scientific information. Thus, through the endorsement of these IPCC reports, governments recognize the authority of their scientific contents.⁴⁴ Among the other Reports,

⁴¹ (Ibid.) IPCC. *"Principles Governing IPCC Work"*, Approved 1–3 October 1998, last amended 14–18 October 2013. Retrieved 22 February 2019.

⁴² Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Chapter I: *"Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene"* pp. 29-94.

⁴³ (Ibid.) Climate Change: International Law and Global Governance Volume I.

⁴⁴ Author Oliver C. Ruppel in Climate Change International Law and Global Governance, Volume I, Chapter I, Part I.

the IPCC's Fifth Assessment Report (AR5) is of particular interest in the context of Climate Change and Human Rights, since it describes in detail how the changes of the climate will negatively affect millions of people and the ecosystems, natural resources and physical infrastructure which they depend on.⁴⁵ The harm includes events which are directly threatening human lives and security, as well as other environmental phenomena which are capable of limiting the access to clean water, food and other fundamental resources for the human life.⁴⁶ The IPCC's Assessment Reports have been extremely important in the international panorama with respect to the necessity to face climate change, as they have provided for a new knowledge on the risks connected to the climate. The knowledge provided, in fact, lie at the origin of the debate upon climate change and human rights, since the IPCC's Reports have had the major role to influence the events who led to the recognition of the relationship between these two worlds. The work of the Panel will be fundamental for the future negotiations and for continuing to provide the world with the best possible information on climate change.

c) The United Nations Framework Convention on Climate Change and the Kyoto Protocol

Two years after the IPCC's affirmation, in 1990, the UN General Assembly (UNGA), established with its Resolution 45/212 an Intergovernmental Negotiating Committee in order to develop an effective legal instrument on climate change.⁴⁷ The following two years, strenuous negotiations took place in Rio de Janeiro at the United Nations Conference on Environment and

⁴⁵ IPCC AR5: "Climate Change 2014: Impacts, Adaptation and Vulnerability"; contribution of the Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2014)

⁴⁶ United Nations Environmental Program (UNEP) Report "*Human Rights and Climate Change*" in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

⁴⁷ "*The International Climate Change Legal and Institutional Framework: An Overview*", article by David Freestone.

Development (UNCED), also known as the Earth Summit, until an outcome was finally reached: the creation of the 1992 UN Framework Convention on Climate Change (UNFCCC). Signed by 154 countries at the Rio Conference, the UNFCCC is the major international treaty on climate change,⁴⁸ which has the ultimate objective of reaching the stabilization of GHG levels in the atmosphere in order to prevent dangerous human-induced interferences with the climate system.⁴⁹ Such a goal should be achieved within a time-frame sufficient enough to allow ecosystems to naturally adapt to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable way.⁵⁰⁵¹ This commitment requires a substantial reduction of the GHG emissions, achievement who is at the core of the UNFCCC's work. Within the meaning of the Convention, Industrialized Countries are the ones expected to limit the most the emission of GHG, since they are the major source of past and current GHG emissions.⁵² The Convention calls them Annex I countries, which comprehend 12 countries from Central and Eastern Europe which are present the most developed and industrialized economical systems, while it calls 'developing countries' the ones which are not required to cut emissions unless the developed countries help them by providing funding and technology. The UNFCCC enshrines a number of fundamental principles which shall guide and inspire the work of the Convention and justify at the same time the obligations for developed and developing States in the Convention; Among these, the principles of *equity* and *common but differentiated responsibilities and respective capabilities* (Article 3), concern, in particular, the fact that all countries have a common responsibility to tackle climate change, but at the same time, an heavier burden is placed on the industrialized countries in order to respond to their historic responsibility to address climate change. These principles are based on the

⁴⁸ Wikipedia, The United Nations Framework Convention on Climate Change.

⁴⁹ "Article 2" (PDF). "*The United Nations Framework Convention on Climate Change*".

⁵⁰ "United Nations Framework Convention on Climate Change (UNFCCC)". "*World Health Organization (WHO)*."

⁵¹ H.K., Jacobson (2001). "United Nations Framework Convention on Climate Change: Climate Policy: International"

⁵² UNFCCC official website, available at "<https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change#:~:text=The%20ultimate%20objective%20of%20the,ecosystems%20to%20adapt%20naturally%20to>".

concerns that the today's current GHG level in the atmosphere is the result of the past 150 years of "carbon-based industrial activity in developed countries",⁵³ and that the impacts of climate change are very unequally distributed, disproportionately affecting poorer regions and countries, who are, in the majority of the cases, those who have generally contributed the least to human-induced climate change. This last concern is what the Convention calls "Unequal Burden"⁵⁴ of the effects of climate change and represent in particular one of the main *injustices* of climate change. The other principles include the Precautionary Principle, The Polluter Pays principle and the Sustainable Development. The first principle consists in the idea that the absence of scientific consensus shall not impede States from taking prevention from a possible harm threatening, when an action or a policy from another State is suspected to cause that harm to the public or the environment. The second is a principle enacted to make the party who's responsible for causing pollution pay for the damage. The last principle regards the idea that development shall meet the present generations needs without compromising future generations ones. One of the most important bodies related to the Convention is the Conference of the Parties (COP), which is a supreme decision-making body under which all the State Parties are represented. In the COP the State Parties are called to review the implementation of the Convention to assess the progresses made in dealing with climate change⁵⁵ and discuss on how to better achieve the Treaty's objectives. The mandate of the COP to amend the Convention is however "broadly limited by the UNFCCC's objective and guiding principles, so that the UNFCCC can only provide for a general framework to combat climate change".⁵⁶ In these regards, it is relevant to notice that originally, the Convention required several amendments as there was a lack of legally binding targets agreed among the signatory parties. Anyhow, this status of ineffectiveness finally came to an end with the introduction of the Kyoto

⁵³ Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Chapter I: "Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene" pp. 29-94.

⁵⁴ UNFCCC, Article 3, para 2.

⁵⁵ "What is the UNFCCC & the COP". *Climate Leaders*. Lead India. 2009.

⁵⁶ (Ibid.) Climate Change: International Law and Global Governance, Volume I.

Protocol to the Convention in 1997. Before moving to analyze the Kyoto Protocol more in detail, it's necessary to focus on an important aspect of the COP's system. In particular, the mechanism of the COP is of major importance for the purpose of the analysis provided in the next Chapters, and this is mainly for two historical COP's who must be observed when addressing the linkage between human rights and climate change: the first is the 16th Conference of the Parties to the UNFCCC, as it gave life, in 2010, to the Cancún Agreements, the first international agreement recognizing officially and universally the linkage between human rights and climate change with the solemnity of an international climate agreement. This Agreement will be further analyzed more in depth. The second COP to be considered, is the more recent 21st Conference of the Parties to the UNFCCC, where the outcome of the negotiations who took place in Paris, in 2015, was the Paris Agreement, and namely one of the most important climate agreements of the last years of negotiations. The Paris Agreement is famous for having set the goal of limiting the global warming to “well below 2 C° compared to pre-industrial level”,⁵⁷ and despite it didn't consider human rights issues as much as expected, it still represents one of the most important sources of legally bounding obligations concerning climate change through the instrument of the Kyoto Protocol. The Kyoto Protocol is in fact the principal source of legally bounding obligations under the international law and the UNFCCC for development countries to reduce their greenhouse gas emissions. Originally, it was created for providing a commitment period going from 2008 to 2012,⁵⁸ but it has been successively amended and renewed for a second commitment period running from 2013 to 2020, following the goal of reducing the greenhouse gas emissions by 18% compared to 1990 levels.⁵⁹ The Kyoto Protocol was adopted in 1997 in Kyoto but entered into force only in 2005, owing to a complex ratification process; its main objective it to operationalize the UNFCCC by providing for commitments of the industrialized countries to limit and prevent GHG emissions on the basis of agreed individual targets.⁶⁰ The Kyoto Protocol

⁵⁷ Paris Agreement, 21st Conference of the Parties to the UNFCCC, 2015.

⁵⁸ "What is the UNFCCC & the COP". *Climate Leaders*. Lead India. 2009.

⁵⁹ Doha Amendment.

⁶⁰ “What is the Kyoto Protocol?”, UNFCCC official website available at [“https://unfccc.int/kyoto_protocol”](https://unfccc.int/kyoto_protocol)

follows the same principles of the Convention and it only binds developed countries, placing on them a heavier burden under the principle of common but differentiated responsibilities and respective capabilities, because it recognizes their major responsibilities for the current levels of GHG emissions in the atmosphere.⁶¹ So the difference between the UNFCCC and the Kyoto Protocol is mainly that “the UNFCCC only encourages industrialized countries to stabilize greenhouse gas emissions, while the Kyoto Protocol obliges them to do so.”⁶² As a result, it is possible to affirm that the UNFCCC and its Kyoto Protocol are articulations on how States must balance their sovereign rights in order to follow their own development agenda while complying at the same time with their overall responsibilities under international law. This means that the global and transboundary nature of climate change demands that “States scale back some of their sovereignty by engaging in international co-operation and negotiation in the interest of the common concern of humankind, as enforced by the UNFCCC preamble.”⁶³ In conclusion, it is clear how the UNFCCC imprinted a very marked sign in the international environmental panorama, and is considered ad one of the most important multilateral environmental treaties in history, as it bounded member States “to act in the interest of human safety even in the face of scientific uncertainty”.⁶⁴

⁶¹ (Ibid.) “*What is the Kyoto Protocol*”

⁶² Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Chapter I: “*Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene*” pp. 29-94.

⁶³ (ibid.) Oliver Ruppel “*Intersections of Law and Cooperative Global Climate Governance- Challenges in the Anthropocene*”

⁶⁴ UNFCCC official website.

1.3 The Existing Response Measures to Climate Change: Mitigation and Adaptation

The UNFCCC insists on two major measures that States are required to adopt in order to address climate change,⁶⁵ namely mitigation and adaptation. In fact, despite the Convention addresses climate change also with other measures such as technical and scientific cooperation, technology transfer, finance, etc.,⁶⁶ when it was first established, in 1992, ‘mitigation’ was considered the first pillar of climate change law within the context of the UNFCCC, with ‘adaptation’ as its second.⁶⁷ In fact, as the concern about climate change increases daily and extreme weather events multiply, there is the need for States to take effective measures in order to both contrast the progression of climate change and to improve public responses to its consequences.⁶⁸ In a general view, mitigation is aimed at minimizing the extent of global warming in terms of “reduction of climate change”, as it involves reducing the flow of heat-trapping GHG and stabilizing their concentrations into the atmosphere⁶⁹ within a timeframe which is broad enough to allow ecosystems to naturally adapt to climate change, to make sure that the natural processes of food production are not affected and to “enable economic development to proceed in a sustainable manner”.⁷⁰ On the other side, adaptation measures are aimed at strengthening the capacity of human societies to deal and adapt to the many climate change-related risks.⁷¹ The goal to reach by adopting adaptation measures is to reduce the level of vulnerability connected to the negative impacts of climate change (such as food insecurity and more

⁶⁵ Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Chapter I: “*Intersections of Law and Cooperative Global Climate Governance – Challenges in the Anthropocene*” pp. 29-94.

⁶⁶ (Ibid.) Climate Change: International Law and Global Governance, Vol I.

⁶⁷ “*Interpreting the UNFCCC’s provisions on ‘mitigation’ and ‘adaptation’ in light of the Paris Agreement’s provision on ‘loss and damage’*”, Morten Broberg, published April 7, 2020.

⁶⁸ “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo, Center for International Earth Science Information Network (CIESIN), Columbia University, Palisades, NY, United States of America.

⁶⁹ NASA, Solutions: Mitigation and Adaptation, available at NASA’s official website “<https://climate.nasa.gov/solutions/adaptation-mitigation/>”

⁷⁰ IPCC 2014 Report on Mitigation of climate change, pag.4.

⁷¹ (Ibid.) NASA Solutions.

intense extreme weather events) but also to exploit, where possible, any potential benefit associated with climate change.⁷² Being climate change a global issue, countries are called on adopting adaptation measures, especially in the absence of international climate policies on the matter which imply that communities around the world are required to solve their own climate problems.⁷³ The IPCC 2014 report on “Climate Change impacts, Adaptation and Vulnerability”, shows, in general, how governments are getting better with adaptation.⁷⁴ Adaptation measures have five general components: “observation; assessment of climate impacts and vulnerability; planning; implementation; and monitoring and evaluation of adaptation actions”.⁷⁵ The UNFCCC conceptualizes mitigation and adaptation measures from different necessary points of view: first of all, mitigation is considered in terms of *actions needed* for limiting GHGs levels in the atmosphere, while adaptation is more widely conceived as providing *adjustments* in the environmental, social, or economic systems in order to respond “to actual or expected climatic stimuli and their effects or impacts”.⁷⁶ Mitigation and Adaptation measures are also addressed and required under the 2015 21st Conference of the Parties’ (COP21) Paris Agreement. In the Agreement, which long-term goal, as previously said, is to keep the level of global average temperature “below 2 °C above pre-industrial levels”,⁷⁷ it is possible to read how mitigation and adaptation measures are considered in separate chapters with minimum or non-existent references to each other’s: this reflects how the idea is to focus on them *equally* but not *jointly*.⁷⁸⁷⁹ References in this sense can be observed in the Adaptation Section of the Draft Agreement,

⁷² (Ibid.) NASA Solutions.

⁷³ (Ibid.)

⁷⁴ IPCC 2014 Report on Climate Change impacts, Adaptation and Vulnerability.

⁷⁵ “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo, Center for International Earth Science Information Network (CIESIN), Columbia University, Palisades, NY, United States of America.

⁷⁶ (Ibid.) “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo.

⁷⁷ Paris Agreement, 21st Conference of the Parties of the UNFCCC.

⁷⁸ (Ibid.) “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo.

⁷⁹ Ad Hoc Working Group on the Durban Platform for Enhanced Action. Informal Note: A. Draft Agreement; B. Draft Decision. 5 October 2015.

which recognize a link between mitigation and adaptation measures,⁸⁰ stating that “Parties recognize that, the greater their mitigation efforts, the less adaptation will be needed”⁸¹ Another reference can be found in the Mitigation section of the Draft Decision, “suggesting to finance adaptation with funds from mitigation”.⁸² Other instances in both Draft texts seem to focus on the idea that, beyond the equality, there should be also a simultaneous consideration of mitigation and adaptation measures, which should as a consequence provide for similar levels of funding. Moreover, both should be considered in the furnishment of technologies and in the capacity-building efforts, and both should be accompanied by mechanisms aimed at evaluating progresses.⁸³ It would be relevant to mention that the Paris Agreement has the merit of having introduced a third pillar in the fight against climate change: The Loss and Damage. The L&D is a specific provision who can interfere with the construction of the other provisions providing mitigation and adaptation measures as required under the UNFCCC.⁸⁴ In fact, the inclusion of L&D in an international treaty has provided the legal basis for finding ‘responsibility’ in the negative consequences coming from the failure of the State Parties to fulfil their obligations under the UNFCCC with respect to the adoption of adaptation and mitigation measures. In this context it’s relevant to notice that the manner in which States Parties respond to their obligations to adopt mitigation and adaptation measures can also affect the enjoyment of human rights.⁸⁵ This is especially true “for actions undertaken to mitigate the greenhouse gas (GHG) emissions that contribute to climate change, as well as projects undertaken to adapt to the impacts of climate change”.⁸⁶ Examples of how certain kinds of mitigation measures can affect the rights of

⁸⁰ (Ibid.) “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo.

⁸¹ Ad Hoc Working Group on the Durban Platform for Enhanced Action. Informal Note: A. Draft Agreement; B. Draft Decision. 5 October 2015.

⁸² (Ibid.) “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo.

⁸³ (Ibid.) “*About mitigation, adaptation and the UNFCCC’s 21st Conference of the Parties*”, Susana B. Adamo.

⁸⁴ “*Interpreting the UNFCCC’s provisions on ‘mitigation’ and ‘adaptation’ in light of the Paris Agreement’s provision on ‘loss and damage’*”, Morten Broberg, published April 7, 2020.

⁸⁵ United Nations Environmental Program (UNEP) Report “*Human Rights and Climate Change*” in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

⁸⁶ (Ibid.) United Nations Environmental Program (UNEP) Report.

certain groups include: hydroelectric projects, which often lead to the destruction of ecosystems upon which local people depend, and can also affect their health and livelihood; biofuels policies and projects, which can have negative side impacts on food availability and price, as well as on water availability and scarcity.⁸⁷ These aspects will be further analyzed in Chapter II. Many concerns exist as well with regard to the consequences of mitigation policies such as pricing carbon, which could have a disproportionate effect on the poorest communities and the other vulnerable groups, “who may suffer great hardship due to the increased price of energy, fuel and goods”.⁸⁸ In this context, as will be further observed, the failure to adopt effective and cautious adaptation and mitigation measures can also affect and interfere with the enjoyment of human rights. In particular, there is the concern that some mitigation provisions could be helpful for one group of people/community while causing on the other side a damage to another, and at the same time there is the concern that adaptation measures could be implemented without a previous effective public consultation thus resulting in outcomes which actually affect the people they are aimed at protecting.⁸⁹ All these aspects will be addressed in the next Chapter.

CHAPTER II

Implications on the Enjoyment of Human Rights

2.1 Foreword

Climate Change is posing a real threat to the entire human race. The more the global average temperature increase and extreme weather events occur, the more

⁸⁷ FAO, *Climate Change Adaptation and Mitigation Challenges and Opportunities in the Food Sector* 7 (2012).

⁸⁸ *Karen Bubna-Litic, Climate Change Impacts on the Poor- A case Study of Australia's Indigenous Population and the Impact of Australia's Response on this Population*, in *Poverty alleviation and environmental law* (Yves Le Bouthillier et al. eds., Edward Elgar 2012).

⁸⁹ (Ibid.) United Nations Environmental Program (UNEP) Report.

at risk the lives and well-being of individuals will be, and as a consequence, their guaranteed rights. The 2007 Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) shows that “the warming of the climate system in unequivocal and accelerating”:⁹⁰ we are assisting to an increase of the average global temperature which is considered as being “the largest and fastest warming trend”⁹¹ in the history of our planet. Without policies to specifically reduce greenhouse-gas emissions, experts expect temperature to increase by 1.6 to 6.9 centigrade degrees by the end of the twenty-first century, as underlined in the IPCC’s AR4.⁹² Intense changes in the climate are able to modify the face of the earth, and in particular human life to an unknown extent. The possible impacts include, inter alia, an increase in the intensity of droughts, land degradation and desertification, as well as serious implications on heat-related mortality, water scarcity and food security.⁹³ Moreover, climate impacts are differently distributed. Some regions are more vulnerable than others and this means poor and less-developed countries are the ones who will suffer the most⁹⁴: because of the conditions of poverty and the lack of a well-structured climate change impacts plan, African countries are the ones in the crosshairs when speaking about climate change-related impacts, as the respect of human rights in these circumstances tends to be more problematic⁹⁵ and human rights violations way more severe.⁹⁶ The Arctic is also one of the regions which is considered more at risk, “because of the impacts of high rates of projected warming on natural systems and human communities”.⁹⁷ When dealing with the human rights profiles of climate change, we deal with the human activity responsible of having procured such a change: human’s emissions of greenhouse gases through the burning of fossil fuels, other

⁹⁰ “*Climate Change 2007*”, Fourth Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC), Cambridge University Press.

⁹¹ (Ibid.) IPCC Fourth Assessment Report.

⁹² (Ibid.)

⁹³ McInerney-Lankford, Siobhan; Darrow, Mac; Rajamani, Lavanya. “*Human Rights and Climate Change: A Review of the International Legal Dimensions*”. World Bank Study. World Bank. © World Bank. 2011. <https://openknowledge.worldbank.org/handle/10986/2291> License: CC BY 3.0 IGO.”

⁹⁴ Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Part II: “*Climate Change and Human Rights*”

⁹⁵ ICHRP (2008:4-5)

⁹⁶ (Ibid.) Climate Change: International Law and Global Governance, Volume I

⁹⁷ “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study; Authors: Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani.

human's emissions coming from agriculture, deforestation, industrial processes etc. In fact, despite geophysical factors being involved in the process, in the human rights context the human behavior must be considered as the center of imputation of the causes and consequences of climate change, since rights and laws are generally referred only to the human behavior and its consequences, while the geophysical factors of climate change should be considered in this context only as "contingencies that might give rise to the need for legal responses".⁹⁸ The size of the problem has been realized in the last decades by a great number of countries which have tried to take measures in a way or another: some industrialized countries, for instance, have recently started to express the concern for an official recognition of a linkage between human rights and climate change which could strengthen as well the idea of a "collective and autonomous right to a safe and secure environment".⁹⁹ The international community is also addressing this new global issue on a multilateral level.¹⁰⁰ As the Office of the United Nations High Commissioner for Human Rights (OHCHR) observed in its Submission to the 21st Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC),¹⁰¹ "climate change impacts, directly and indirectly, an array of internationally guaranteed human rights. States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis."¹⁰² In this respect, when dealing with human rights, it is important to start bearing in mind an important aspect (which will be addressed more in detail in the next Chapters) and namely, that invoking the notion of human rights implies the presence of both rights and duties, in addition to the fact that in order for human rights to have meaning, a

⁹⁸ (Ibid.) Climate Change: International Law and Global Governance, Volume I, part II

⁹⁹ (Ibid.) "*Human Rights and Climate Change*" a review of the international legal dimensions; A World Bank study

¹⁰⁰ (Ibid.) Climate Change: International Law and Global Governance, Volume I, part II; For an overview, see KAS (2011).

¹⁰² "*Understanding Human Rights and Climate Change*", Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21).

right-holder and a duty-bearer must always be identified.¹⁰³ Moreover, each human right should be legally addressed according to “one of the sources of private international law, (traditionally identified with those under article 38 of the Statute of the International Court of Justice: principally treaties, custom and general principles of law), or some relevant domestic laws”.¹⁰⁴ However it must be emphasized that climate change may actually be a phenomenon which threatens or interferes with the enjoyment of a given human right without necessarily implying that those who have responsibilities under international law for the realization of that right have violated their obligations under human rights law:¹⁰⁵ as underlined by the same OHCHR in its 2009 Report¹⁰⁶ on the relationship between climate change and human rights, in fact, despite the implications of climate change upon human rights are obvious, it is less obvious whether and under which circumstances such implications can be considered as human rights violations in a strict legal sense.¹⁰⁷ It is a real challenge, for instance, to determine the complex causal relationship between emissions from a given country and the harm occurred due to climate change in another country, and to separate as well the climate change-related harm from other possible causes.¹⁰⁸ In these regards, the OHCHR empathizes in the 2009 Report that “adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has

¹⁰³McInerney-Lankford, Siobhan; Darrow, Mac; Rajamani, Lavanya. *“Human Rights and Climate Change: A Review of the International Legal Dimensions”*. World Bank Study. World Bank. © World Bank. 2011. <https://openknowledge.worldbank.org/handle/10986/2291> License: CC BY 3.0 IGO.”

Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1&isAllowed=y>”

¹⁰⁴ (Ibid.) *“Human Rights and Climate Change” a review of the international legal dimensions*; A World Bank study.

¹⁰⁵ (Ibid.) *“Human Rights and Climate Change” a review of the international legal dimensions*; A World Bank study.

¹⁰⁶ UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, A/HRC/10/61, available at: <https://www.refworld.org/docid/498811532.html>. In the next pages and chapters, it will be mentioned as “OHCHR 2009 Report”. The Report will be analyzed in the next paragraphs and more in depth in Chapter III for what concerns human rights obligations in the context of climate change.

¹⁰⁷ (Ibid.) 2009 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61)

¹⁰⁸ (Ibid.) *“Human Rights and Climate Change” a review of the international legal dimensions*; A World Bank study.

occurred”.¹⁰⁹ These argumentations will be further observed in Chapter III. In the meantime, relying on these anticipations, we can start to consider that, in the context of human rights which are affected by climate change, it would be more correct to speak about “threats” or “non-realization” of human rights instead of fully-fledged violations thereof.¹¹⁰

2.2 The Inuit Petition and the Male’ Declaration: towards a concretization of the linkage between Human Rights and Climate Change

At the origin of the debate on the linkage between Climate Change and its impacts on Human Rights, lies a petition submitted by the Inuit indigenous people to the Inter-American Human Rights Commission. The petition, submitted in 2005, was about an alleged violation of the Inuit’s Human Rights provoked by the United States’ significant contribution to global warming. In fact, in the Arctic, the Inuit people rely on the ice as a fundamental element of their survival, since it is a necessity for them to traverse it for hunting, gathering food and communicating. For years, the United States has been the major producer of carbon emissions, which are today known as being heavy contributions to the global warming. For Inuit peoples, however, rising temperatures due to the global warming means “jeopardizing culture as significantly as it endangers ecological environments”.¹¹¹ Thinner ice surfaces, shorter freeze periods, rapid melting periods, and an overall ice formation decrease, are all elements which directly impact the traditional lifestyle of Inuit people, as such climate effects drastically reduce their ability to travel, a key and vital component for their cultural survival. Moreover, Arctic wildlife including polar bears, seals and walruses that the Inuit

¹⁰⁹ 2009 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61)

¹¹⁰ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

¹¹¹ Center for International Environmental Law, article titled “*Inuit Petition and the IACHR*”, available at the website <https://www.ciel.org/project-update/inuit-petition-and-the-iachr/>.

people depend upon for survival also face imminent destruction as their habitats slowly melt into a warmer sea. The petition, named “Violations Resulting from Global Warming Caused by Acts and Omissions of the United States”¹¹² argued that the IACHR was “obligated to act on issues of climate control because, as exemplified in the circumstances of the Inuit people, global warming directly impedes human rights by disrupting a culture”.¹¹³ Despite the petition was declined by the IACHR because of the lack of information provided by the petitioners for the ascertainment of the violations, this case is considered the precursor of a big change in terms of how the international community considers the climate change, as it has the merit of having established “the critical linkage between climate change and human rights”.¹¹⁴ Two years after the Inuit petition, in 2007, a group of small island States adopted the Male’ Declaration, the first intergovernmental statement that “climate change has clear and immediate implications for the full enjoyment of human rights”.¹¹⁵ Within the Declaration, accepting the conclusions of the Intergovernmental Panel on Climate Change (IPCC), including that “climate change is unequivocal and accelerating, and that mitigation of emissions and adaptation to climate change impacts is physically and economically feasible if urgent action is taken”,¹¹⁶ the representatives of the small island developing States asked, inter alia, to the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (UNFCCC), to cooperate with the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Human Rights Council for the assessment of human rights implications of climate change.¹¹⁷ Moreover, acknowledging that the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol are the most important initial multilateral efforts in order to face climate change through

¹¹² Petition to the Inter-American Commission on Human Rights, submitted by Sheila Watt-Cloutier with the support of the Inuit Circumpolar Conference, on behalf of all Inuit of the Arctic Regions of the United States and Canada, December 7, 2005.

¹¹³ (Ibid.) Center for International Environmental Law.

¹¹⁴ (Ibid.) Center for International Environmental Law

¹¹⁵ United Nations Environmental Program (UNEP) Report “*Human Rights and Climate Change*” in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

¹¹⁶ Male’ Declaration on the Human Dimension of Global Climate Change, adopted at the Conference of the Alliance of Small Island States, 14 November 2007.

¹¹⁷ (Ibid.) Male’ Declaration.

global legal instruments,¹¹⁸ they also requested, inter alia, to the Office of the United Nations High Commissioner for Human Rights (OHCHR) to conduct researches and studies upon the possible implications of climate change on the full enjoyment of human rights.¹¹⁹ The Male' Declaration has acquired a particular importance not only for its innovative arguments in the field of Climate Change and Human Rights, but also for what came next. In fact, the signatories to the Male' Declaration inspired the effort of the UN Human Rights Council to adopt, the next year, the first of a series of resolutions linking climate change and its impacts on human rights: Resolution 7/23 was titled *Human Rights and Climate Change*, and was aimed at giving effect to the outcomes of the Male' Declaration (and this seems obvious considering that the Declaration in itself couldn't have required the UN human rights bodies to take the expected actions, but it necessarily needed the intermediation of the Council), thus requesting to the Office of the UN High Commissioner for Human Rights (OHCHR) to conduct analytical studies and researches on the relationship between human rights and climate change.¹²⁰ In these regards, as requested by the Maldives, the OHCHR issued in January 2009 its Seminal Report, explaining this relationship and linkage. The Report underlined that climate change threatens the enjoyment of many human rights, including the rights to life, health, food, water, housing, and self-determination. It concluded that climate change causes a necessary and categorical violation of human rights, and that States have obligations under human rights law to address climate change.¹²¹ It is on these premises that, in 2010, the State Parties to the UN Framework Convention on Climate Change agreed in Cancún¹²² that "Parties should, in all climate change related actions, fully respect human rights".¹²³ The Cancún Conference of the Parties to the UNFCCC in 2010 was the first official decision ever made to link human rights

¹¹⁸ (Ibid.) Male' Declaration

¹¹⁹ (Ibid.) Male' Declaration

¹²⁰ United Nations Environmental Program (UNEP) Report "*Human Rights and Climate Change*" in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

¹²¹ UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, 15 January 2009, A/HRC/10/61, available at: <https://www.refworld.org/docid/498811532.html>

¹²² (Ibid.) UNEP Report.

¹²³ UN Framework Convention on Climate Change, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010/ "Cancun Agreements"

and climate change.¹²⁴ The relevance of human rights to climate change is now universally recognized.¹²⁵ Following this line, some years after, the UN special rapporteurs on human rights also gave a description of the effects of climate change on the human rights within their purview,¹²⁶ and, on the occasion of human rights day in Geneva, the 10th of December 2014, they underlined the “urge of Member States to integrate human rights standards and principles in the climate change negotiations”,¹²⁷ unanimously calling on States “to make sure that human rights are at the core of climate change governance”.¹²⁸

2.3 Human Rights Law and its Role in the Environmental Protection

Despite the UNFCCC seeks to “protect the climate system for the benefit of present and future generations of humankind”,¹²⁹ it doesn’t really comprehend a human rights protection, humanitarian aid or any kind of help for communities and groups in case of environmental harms, instead the UNFCCC is an agreement made between States with the aim of anticipating, preventing or minimizing climate change and its causes, and mitigate its side effects.¹³⁰ In this sense, a system of human rights rules and duties with respect to the protection of human rights against the threats of climate change would be extremely helpful. The adoption of a human rights-based approach, as we will better observe in the next Chapters, would be fundamental for the achievement of such a goal. By now, in order to understand how the human rights intersects with the climate change field,

¹²⁴ Cancun Decision 1/CP. 16.

¹²⁵ (Ibid.) UNEP Report.

¹²⁶ Business & Human Rights resource center’s web blog. Report titled “*Climate Change and Human Rights Law: Where we are now*”, 29 Sep 2015, Author: John H. Knox, UN Special Rapporteur on human rights and the environment.

¹²⁷ Statement of the United Nations Special Procedures Mandate Holders on the occasion of the Human Rights Day Geneva, 10 December 2014.

¹²⁸(Ibid.) Statement of the UN Special Procedures Mandate Holders.

¹²⁹ United Nations Framework Convention on Climate Change.

¹³⁰ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

first it is necessary to analyze human rights law and its relevance within the environmental context. Human Rights are aimed at protecting individuals, groups and people against all actions and omissions which may threaten their fundamental freedoms and human dignity. In order to do so, Human Rights Law obliges States and other State actors to respect, protect and fulfill human rights.¹³¹ Every State has ratified several, or in any case, at least one of the nine core international human rights treaties designated by the UN: The International Convention on the Elimination of All forms of Racial Discrimination (1965), The International Covenant on Civil and Political Rights (1966), The International Covenant on Economic, Social and Cultural Rights (1966), The Convention on the Elimination of All forms of Discrimination against Women (1979), The Convention against Torture and other Cruel, Inhumane or Degrading Treatment and Punishment (1984), The Convention on the Rights of the Child (1989), The International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (1990), The Convention on the Rights of Persons with Disabilities (2006), The International Convention for the Protection of All Persons From Enforced Disappearances (2006).¹³² The core international human rights treaties cover any category of rights (social, cultural, economic, civil and political) and provide for International technical bodies named “Treaty Bodies” (mainly Committees)¹³³ which are responsible of monitoring the implementation of such treaties by the State Parties who ratified them. Treaty Bodies are also aimed at reviewing the periodic reports which are issued by State Parties in order to prove their compliance with the treaties obligations, and eventually they can decide over the non-compliance, conduct investigations and give interpretations or clarify the extent and meaning of some rights in the light of the evolving law.¹³⁴ The two central human rights treaties who play an important role in the climate

¹³¹ “*Understanding Human Rights and Climate Change*”, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21).

¹³² Human Rights Law Research Guide, Georgetown Law Library, available at the website [“https://guides.ll.georgetown.edu/c.php?g=273364&p=6066284”](https://guides.ll.georgetown.edu/c.php?g=273364&p=6066284)

¹³³ For instance, The Human Rights Committee is the body of independent experts who is charged with monitoring the correct implementation of the ICCPR by the state parties.

¹³⁴ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

change debate with regard to the protection of human rights, as we will further discuss, are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by almost all the greenhouse gases major emitters except for China, who signed but didn't ratify the ICCPR, and the United States, who has signed but not ratified the ICESCR. In the protection of human rights, Regional and National courts play an important role, too. In fact, the general statements of human rights given at a global level by the treaties are then translated in precise legal obligations and policy stipulation thanks to national courts.¹³⁵ National courts also play an important role for what concerns the new tendency of a *climate justice* on the matter of climate change and human rights, which is a new type of case law who is gradually emerging from cases brought mainly by NGO's to the National Courts thanks to the day by day more accepted idea of climate change as an ethical and moral concern rather than a mere environmental one. An example of *climate justice* will be provided in the next Chapter. For what concerns the Regional level, among the most remarkable regional human rights instruments there are the European Convention on Human Rights, the African commission and Court on Human and People's Rights and the Inter-American Commission and Court of Human Rights. These Regional treaties enshrines civil and political rights such as the right to life, movement and residence, and respect for privacy, family and house.¹³⁶ They also recognize a right to property. In particular, the European Union system is also enhanced by the European Union Charter on Fundamental Rights, which enshrines and reflects, inter alia, on environmental protection issues: the environmental protection is discussed in the Fourth Title of the Charter named "Solidarity", rather than in the Fifth which is about individual rights, and this has sparked the idea that probably the environmental protection is seen in the context of the Charter more as a EU policy objective than a human right *per se*. The European and Inter-American regional systems protect socio-economic rights as well but use different agreements in

¹³⁵ (Ibid.) "*Human Rights and Climate Change*" a review of the international legal dimensions; A World Bank study.

¹³⁶ (Ibid.)

order to do it: respectively the European Social Charter¹³⁷ and the Protocol of San Salvador to the American Convention.¹³⁸ These treaties enshrine, inter alia, the right to life, to the highest attainable standard of health, to an adequate standard of living including adequate food, clothing and housing.¹³⁹ Moreover, the Protocol of San Salvador also mentions a “right to live in a healthy environment” among the other economic, social and cultural rights.¹⁴⁰ Human Rights Law poses several obligations to the parties of the treaties. More specifically, human rights obligations require States to act both individually and at the international level through international cooperation. The ICESCR, for instance, declares that State Parties should act “individually and through international assistance, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant”.¹⁴¹ This statement underlines that the recognition of economic, social and cultural rights can’t happen overnight, but instead it must be done progressively through States using the maximum resources in order to take immediate, concrete and targeted steps towards the realization of these rights.¹⁴² Moreover, the ICCPR declares that State Parties have a duty “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant”.¹⁴³ As it has been interpreted,¹⁴⁴ in this statement the word “respect” means to avoid a situation in which the State in itself violates the rights, while the word “ensure” emphasizes how a State cannot only limit itself to avoid the direct violation from its part, but it must secure the right also from the actions committed by private actors such as persons or entities who

¹³⁷ The European Social Charter has been recently revised in 1996 and has superseded the older version *in toto* or in part for the parties who ratified it.

¹³⁸ An additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, 1988.

¹³⁹ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

¹⁴⁰ San Salvador Protocol, Article 11(1). The African Charter at Article 24 also includes a specific right to a “satisfactory” environment, but as a right of peoples rather than individuals.

¹⁴¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(1).

¹⁴² (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

¹⁴³ International Covenant on Civil and Political Rights (ICCPR), Article 2.

¹⁴⁴ “The duty to respect . . . means that the States parties must refrain from restricting the exercise of these rights where such is not expressly allowed.” Manfred Nowak, UN. Covenant on Civil and Political Rights: ICCPR Commentary (2005)

would interfere with the enjoyment of that right protected by Covenant, as far as it is applicable also to other private actors who differs from State Parties.¹⁴⁵ In addition to these duties to respect and to protect human rights from private actors interferences, the body of individual experts who monitors the implementation of the ICESCR, (namely the Committee on Economic, Social and Cultural Rights) has also identified a duty to “fulfil” human rights, which implies States to be proactive in order to guarantee the full realization of the rights, through the adoption of positive and appropriate measures. The duties to respect, protect and fulfil human rights will be further discussed. Anyway, within this context it is necessary to underline how, among the other obligations, the general obligation to prevent any foreseeable harm should include and actually includes also climate change-related harms. For instance, as the Office of the High Commissioner for Human Rights has underlined in its Submission to the 21st Conference of the Parties to the UNFCCC, the basic human rights principles of equality and non-discrimination¹⁴⁶ require in any case action to “address and remedy the disproportionate impacts of climate change on the most marginalized and to ensure that climate actions benefit persons, groups and peoples in vulnerable situations and reduce inequality”.¹⁴⁷ In the International Law context, we can notice how Human Rights Law and Environmental Law are two different areas of International Law who have independently and largely evolved in the last 50 years, and despite these fields of law may all play different roles in social, economic and political problems, yet they may also interact with each other in many unforeseeable ways. If on one side this could give rise to difficulties arising from the diversification and expansion of International Law (namely a “fragmentation problem”),¹⁴⁸ on the other side, some International Law

¹⁴⁵ “It is . . . likely that the general duty in Article 2(1) on States to ‘ensure’ ICCPR rights entails a duty, of perhaps varying degrees of strictness, to protect individuals from abuse of all ICCPR rights by others.” Joseph, Sarah et. al *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2000).

¹⁴⁶ Principles guaranteed by both the UN Covenants, as well as the American and European Conventions and the African Charter.

¹⁴⁷ “*Understanding Human Rights and Climate Change*”, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21).

¹⁴⁸ See International Law Commission, “*Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of*

Literature¹⁴⁹ shows that “in international law there is a strong presumption against normative conflict, with the consequence that international legal commitments relating to climate change, human rights and other relevant regimes should be interpreted, as far as possible, to give rise to compatible obligations”.¹⁵⁰ In these regards, the International Law Commission has emphasized¹⁵¹ that Human Rights Law could “guide the interpretation of the rights and obligations under the UNFCCC and the Kyoto Protocol”¹⁵² (treaties which mainly regulate the international climate change regime, as explained in the previous Chapter) upon meeting certain conditions: firstly, the existence of a situation in which human rights norms and the climate change law norms are both valid and applicable and secondly the absence of a conflict of norms.¹⁵³ In these regards, considering that there are no arguments over an “environmental protection” in the vast majority of the human rights treaties (except for the European Union Charter on Fundamental Rights and the Protocol of San Salvador to the American Convention, as previously mentioned), it is relevant to notice that most of the norms on the environmental protection are the results of the interpretation made by regional and national tribunals, treaty bodies, and UN Human Rights Special Procedures as well (as will be observed in Chapter III),¹⁵⁴ over the rights

International Law”, Report of the International Law Commission to the General Assembly, 61 U.N. GAOR Supp. (No. 10) U.N. Doc. A/61/10 (2006).

¹⁴⁹ McLachlan, Campbell, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) I.C.L.Q. 279 (2005); Pauwelyn, Joost, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, (2004).

¹⁵⁰ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

¹⁵¹ See International Law Commission, *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the International Law Commission to the General Assembly, 61 U.N. GAOR Supp. (No. 10) U.N. Doc. A/61/10 (2006).

¹⁵² (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

¹⁵³ (Ibid.) International Law Commission, “*Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*”, Report of the International Law Commission to the General Assembly, 61 U.N. GAOR Supp. (No. 10) U.N. Doc. A/61/10 (2006): “the word valid in regard to two different norms in a given situation means that they each cover the facts of which the situation consists. The word applicable in regard to two different norms in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.”

¹⁵⁴ See i.e. the Mapping Report of the Independent Expert John Knox on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.

protected by human rights treaties¹⁵⁵ (especially the rights to life and health). This means consequently that tribunals have derived from the human rights system of duties remarkably similar duties also in the environmental context; thus, in confirmation to what the International Law Commission affirmed,¹⁵⁶ human rights are actually able to offer a normative and institutional framework for strengthening the accountability of those responsible for adverse impacts of climate change, as well as the accountability of States and other stakeholders to implement adaptation and mitigation measures.¹⁵⁷ In conclusion, it appears relevant to point out that in order to strengthen the use of human rights law as a guiding principle for shaping climate change rights and obligations, all Human Rights treaty bodies, Special Procedures, courts and tribunals which deal with human rights, should approach and perform their functions with a fuller appreciation of the strict linkage existing between human rights and climate change regimes, as this would help international law evolving towards the adoption of a human rights-based approach to climate change.

2.4 Introducing the analysis of climate-related impacts over the different Human Rights

In order to underline the necessity of a human rights-based approach to climate change, it is first necessary to demonstrate how human rights are actually involved in the anthropogenic climate change process and how these two international law fields can actually intersect at a “practical” level. For these reasons, the following analysis will examine a group of human rights which are protected under public international law that may be (and actually are already being) impacted negatively by climate change. In particular, this analysis focuses on the rights to life, health, food, water, housing, development and self-

¹⁵⁵ The relevant jurisprudence in this context mainly derives from regional bodies.

¹⁵⁶ *Supra* note 145 and 147.

¹⁵⁷ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

determination, arguing that these rights (together with many other human rights) are presently being threatened by climate change, or there is a risk of climate impacts, or there is a risk that climate change will worsen the already compromised enjoyment of these rights. The rights in the following analysis are subjects of obligations under international human rights treaties (principally the ICESCR and the ICCPR) which have been signed by the vast majority of countries; obligations according to which State Parties must respect, protect and fulfill the rights in question. The analysis will try to demonstrate the importance for States to protect human rights from climate change, starting from the theoretical assumption that the failure of a State to take effective measures against climate change could give rise to a direct or indirect violation of human rights. May such an assumption be difficult to undertake, (for instance, in the context of specific rights where it is complicated to speak in terms of single States taking single measures) the analysis will focus on a more general vision of climate change as a phenomenon capable in itself to violate human rights, consequently calling for States to cooperate in order to mitigate its negative effects. In addition, particular attention will be given to climate change mitigation and adaptation policies undertaken by State Parties to the UNFCCC and Kyoto Protocol in order to face the climate-related negative impacts, as these policies would mean, in the case of specific human rights, aggravating a situation already compromised by climate change. Within this context, in fact, there are specific human rights obligations which climate change policies should take into account before being applied, and despite the human rights framework clearly doesn't offer a blueprint for the complex actions and policy choices involved in mitigation and adaptation plans, it surely calls for a special attention upon individuals, putting a human face to problems, those related to the negative impacts of climate change, which, albeit important, without such a "humanization" would still appear abstract and distant.

Part A Directly Involved Human Rights: Impact on Life and Health

a) Climate Change impacts on the Right to Life

The right to life is a fundamental human right protected under international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights and the African Charter.¹⁵⁸ The protection under those treaties implies that all States are obliged to respect, protect and fulfill the right to life and to take effective measures in order to prevent predictable loss of life. According to the IPCC's Fifth Assessment report (AR5) the risks that human life could be threatened by the extreme weather events connected to climate change are "moderate to high at temperatures of 1C° to 2C° above pre-industrial levels".¹⁵⁹ Extreme weather events such as droughts, increased heat, wild-fires, and floods may be the most immediate threat to the right to life, but surely are not the only one; in fact, climate change could actually indirectly kill through other side-phenomena including hunger and malnutrition, scarcity of water caused by droughts and desertification, diseases and injuries. In all these cases, death is a consequence of climate change, which in turn is a consequence of human activities. This means that those specific human activities, (such as the burning of fossil fuels, as discussed in Chapter I) "are costing lives and are, thus, active violations of the right to life".¹⁶⁰ It is estimated that climate change is already causing approximately 400.000 deaths every year, and the number is expected to

¹⁵⁸ ICCPR, Article 6; CRC, Article 6; European Convention, Article 2; American Convention, Article 4; African Charter, Article 4

¹⁵⁹ IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

¹⁶⁰ Climate Change: International Law and Global Governance, Volume I: Legal Responses and Global Responsibility. Authors: Oliver C. Ruppel, Christian Roschmann, Katharina Ruppel-Schlichting. Part II: "Climate Change and Human Rights"

grow to 700.000 by 2030.¹⁶¹ Moreover, the threats to the right to life are more severe in some regions than others: it is the case of the Arctic, where Inuit people submitted their Petition to the IACHR claiming that climate change was “jeopardizing individual Inuit lives”,¹⁶² or the Maldives and other small island States, which are particularly at risk due to the rising sea levels resulting from warmer water and ice melting. In all these cases, the most vulnerable and defenseless ones (and in particular children and indigenous people) are always the more deeply affected and consequently they deserve to be putted in the condition to rightfully claim for a stronger protection. In 2008, in the General Comment n.36 on the right to life under Article 6 of the ICCPR, the Human Rights Committee explained that the “inherent right to life”, which belong to every human being as enshrined in Article 6 of the Covenant, is not subject to restrictive interpretations, and must be protected by all States through the adoption of positive measures.¹⁶³ On the basis of these statements, then, among the possible causes who constitute violations of the right to life, it would be logical to include also the lack of action taken by a State in order to prevent and mitigate any possible life-threatening harm caused by climate change within its territory. Precisely in this regard, the General Comment n.36 of the Human Rights Committee contains two paragraphs, the n.26 and the n.62, which are dedicated to address the relationship between human rights and the environment and are particularly significant in this context; in fact, paragraph 26, under Section III on the “Duty to Protect”, explains that “the duty to protect life implies State Parties to adopt appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include [...] degradation of the environment [...]”.¹⁶⁴ Likewise, paragraph 62, under Section IV of the GC concerning “the relationship of Article 6 with other articles

¹⁶¹ Report by the Climate Vulnerable Forum and DARA International, Second edition: A guide to the cold calculus of a hot planet (DARA and Climate Vulnerability Monitor, 2012), p. 17.

¹⁶² *supra* note 108.

¹⁶³ Human Rights Committee, General Comment n.36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.

¹⁶⁴ Human Rights Committee, General Comment n.36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the right to life, Paragraph 26, Section III, “Duty to protect”.

of the Covenant and other legal regimes”, emphasizes that environmental protection and climate change are some of the most severe threats to the enjoyment of the right to life for present and future generations; thus, the obligations of State Parties under international environmental law should permeate also the contents of Article 6 of the Covenant on the right to life, and, at the same time, the obligations of State Parties to respect and ensure the right to life under Article 6 should also permeate their other relevant obligations under international environmental law.¹⁶⁵ As a consequence, the implementation at national levels of the obligation to respect and ensure the right to life with dignity lawfully depends, inter alia, “on the measures taken by State Parties to protect and preserve the environment against harm, pollution and climate change caused by public and private actors...”.¹⁶⁶ Combined together, these two paragraphs show that environmental degradation both allows and is in itself (in the form of climate change) one of the most direct and serious threats to the possibility of enjoying the right to life with dignity.¹⁶⁷ Thus, because of these reasons, the preservation and protection of the environment constitutes a valid component of the obligations to respect, protect and fulfill the right to life, requiring States to adopt effective measures in order to protect the right to life against “harm, pollution and climate change caused by public and private actors”.¹⁶⁸ In the past, some countries such as Australia, the United States and Denmark, have expressed their concern about the fact that, with the General Comment n.36, the Human Rights Committee was setting out new legal obligations; However, it has been clarified by the Special Rapporteurs¹⁶⁹ that the Human Rights Committee didn’t meant to create new obligations, but instead it was just setting out expectations

¹⁶⁵ Human Rights Committee, General Comment n.36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the right to life, Paragraph 62, Section IV, “The relationship of Article 6 with other articles of the Covenant and other legal regimes”.

¹⁶⁶ (Ibid.) GC n.36, Paragraph 62.

¹⁶⁷ The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020), International and Comparative Law Quarterly, British Institute of International and Comparative Law, Cambridge University Press website, available at [“https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/human-rights-committee-environmental-protection-and-the-right-to-life/5AB04D2AC3A23197AD6E8EC3D88AA108#”](https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/human-rights-committee-environmental-protection-and-the-right-to-life/5AB04D2AC3A23197AD6E8EC3D88AA108#)

¹⁶⁸ (Ibid.) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020) referring to the text of GC Paragraph 62.

¹⁶⁹ Special Rapporteur Shany, See Discussion of the General Comment n.36, Human Rights Committee, 3321st meeting, 118th session (25 October 2016)

on how States would have implemented their already existing obligations.¹⁷⁰ Moreover, a special merit has been attributed to paragraphs 26 and 62 of the General Comment for they played a key role in a recent case, *Portillo Càceres v Paraguay* (2019), in which, for the first time in its jurisprudence,¹⁷¹ relying on what had been previously affirmed in the General Comment, the Human Rights Committee “recognized explicitly that the failure of a State to take action against environmental harm violates its obligations to protect the rights to life and to private and family life under Articles 6 and 17 of the ICCPR”.¹⁷² The potential of this case has been further confirmed in another case, *Teitiota v New Zealand*, in which the Human Rights Committee reaffirmed the interpretation of Article 6 given in *Portillo Càceres v Paraguay* also expanding the application of this concept to new extents such as refugee law. Both these decisions have gained great importance in the “human rights and climate change panorama” since they set an important precedent for the affirmation of environmental protection as a component of the right to life.¹⁷³

i) Portillo Càceres v Paraguay case

In *Portillo Càceres v Paraguay*, a farming family in the Department of Canindeyú, District of Curuguaty in Paraguay, submitted a petition to the UN Human Rights Committee claiming that the use of agrochemicals and pesticides in the local soy farms by nearby agrobusinesses had poisoned many residents and

¹⁷⁰ The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020), International and Comparative Law Quarterly, British Institute of International and Comparative Law, Cambridge University Press website, available at [“https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/human-rights-committee-environmental-protection-and-the-right-to-life/5AB04D2AC3A23197AD6E8EC3D88AA108#”](https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/human-rights-committee-environmental-protection-and-the-right-to-life/5AB04D2AC3A23197AD6E8EC3D88AA108#)

¹⁷¹ Over the years, the Human Rights Committee has been called to the attention of several cases in which there was a potential connection between the environmental protection and human rights, but in none of these the Committee was able to elaborate a real and direct link. See i.e. *E.H.P v Canada* (1982); *Kitok v Sweden* (1988); *Poma Poma v Peru* (2009).

¹⁷² (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020) referring to the text of GC Paragraph 62.

¹⁷³ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

had resulted in the death in 2011 of one of the family relatives, Mr. Ruben Portillo Càceres, a 26-year old farmer, allegedly because of his intake of agrochemicals¹⁷⁴. Since 2005 the area of Curuguaty has seen one of Paraguay's major agribusiness expansions, principally through the use of mechanized and extensive monoculture of genetically modified soybeans. As a consequence, this massive use of agrochemicals had a serious impact on the living conditions of many locals and on their health. For these reasons, the farmers also filed an *amparo*, - a legal action for the violation of their constitutional rights - alleging that the agrochemicals used in the soy farms were violating their right to life, to adequate food, water and health.¹⁷⁵ On April 15 2011, the Curuguaty District Criminal Court affirmed that the Ministry of the Environment, as well as the Health Service had failed in achieving their duties, causing a serious physical harm to the complainants;¹⁷⁶ anyway, despite this decisions, the use of great amount of agrochemicals continued even without environmental permits or protective measures.¹⁷⁷ Motivated by the impunity, then, the complainants decided in 2013 to submit a petition to the Human Rights Committee, alleging that the State of Paraguay was still violating his duty to protect by avoiding to act with diligence and by continuing to allow the extensive use of great amounts of agrotoxines in territories adjacent to locals homes without enforcing environmental controls.¹⁷⁸ They claimed that by acting in this way, the State of Paraguay violated their rights to life (Article 6) and physical integrity (Article 7) protected under the International Covenant on Civil and Political Rights (ICCPR), in addition to their "right to protection from arbitrary and unlawful interference with their privacy, family and residence"¹⁷⁹ protected under Article 17 of the Treaty, due to the intrusion of environmental pollution in their territories. Finally, they claimed also a violation of their right to an effective

¹⁷⁴ ESCR-Net, Portillo Càceres and Others. v Paraguay, CCPR/C/126/D/2751/2016, Communication 2751/2016. Website "<https://www.escr-net.org/caselaw/2020/portillo-caceres-and-others-v-paraguay-ccprc126d27512016-communication-27512016>"

¹⁷⁵ (Ibid.) ESCR-Net Portillo Càceres and Others. v Paraguay.

¹⁷⁶ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁷⁷ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁷⁸ (Ibid.)

¹⁷⁹ (Ibid.) ESCR-Net Portillo Càceres and Others. v Paraguay.

judicial remedy under Article 2(3)(a), due to the lack of the government to provide for an effective, diligent and impartial investigation over the circumstances of environmental contamination which led to the death of Mr. Portillo Càceres, remained unpunished”.¹⁸⁰ After finding that there were no obstacles to the admissibility of the petition, the Committee commented each of the arguments advanced by the complainants. First of all, the Committee considered that the massive spraying of agrochemicals in considerable quantities constituted a real threat to the life of the complainants which could have been reasonably avoided by the State of Paraguay: considering the gravity of the poisoning suffered by the complainants, and considering as well the event of the death of the 26-years old Mr. Portillo Càceres, the Committee recognized the violation of the right to life under Article 6 of the Covenant; it underlined in its decision that “the right to life cannot be properly understood if it is interpreted restrictively and that its protection requires States to adopt positive measures”.¹⁸¹ Most importantly, relying on the two paragraphs of the General Comment n.36, the HRC made it clear that among the general conditions of society which may give rise to a threat to the right to life or may interfere with its enjoyment “with dignity”, there is also the environmental pollution, as it affirmed the possibility that State Parties may be violating Article 6 of the ICCPR even if it hasn’t resulted yet in a loss of life.¹⁸² Moreover the Committee declared that the State of Paraguay, by not providing for an adequate control of the illegal polluting situation also violated Article 17 of the Covenant, as claimed by the complainants. Finally, due to the negligence of the State of Paraguay to intervene (eight years passed since the first claims) and due to the slowness and the worthlessness of the investigations conducted, the Committee concluded the violation of Article 2(3)(a), which requires an effective judicial remedy. In fact, in order to guarantee an effective judicial remedy, the Committee emphasized that State Parties must: 1) undertake effective and detailed investigations of the events occurred; 2) apply criminal and administrative sanctions to the responsible

¹⁸⁰ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁸¹ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁸² (Ibid.)

of the events in question; 3) guarantee the full reparation and an adequate compensation to those who suffered an harm caused by the events in question. In all these matters, the State of Paraguay has failed to comply with its duties.¹⁸³ The importance of this case is not only linked to the fact that the HRC, on the 9 August 2019, issued a landmark decision which would have set a precedent in addressing the environmental protection and human rights, but also to the fact that for the first time it is a UN Treaty Body to concretize and address in a clear way a link (specifically the one between environmental degradation and the right to life), which until now had been mainly developed in the jurisprudence of regional human rights courts.¹⁸⁴ In this context, it is possible to affirm that this case had the effect to “crystallize” a new body and practice on the existence of a relationship between the environmental protection and the right to life. Together with the General Comment n.36, then, the decision of the Human Right Committee “as a global body interpreting a global treaty”¹⁸⁵ will have a great implication on all future cases in this field.

ii) Teitiota v New Zealand case

In 2013, Ioane Teitiota, a national of the small Pacific island nation of Kiribati, applied for asylum and refugee status in New Zealand, claiming that climate change and the rise of sea level forced him to migrate from the island of Tarawa to New Zealand, since Tarawa island and the republic of Kiribati had become “an untenable and violent environment for him and his family”.¹⁸⁶ The Immigration and Protection Tribunal rejected Mr. Teitiota’s application, as well as the Supreme Court and the Court of Appeal did in second instance, arguing that the application lacked substantial grounds or evidence for believing that the

¹⁸³ (Ibid.)

¹⁸⁴ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁸⁵ (Ibid.)

¹⁸⁶ Teitiota v New Zealand (n.7) para 2.1.

claimant's life and the lives of his family were in danger. Having exhausted his domestic remedies, then, Mr. Teitiota filed a complaint before the Human Rights Committee claiming that, by forcing him to return to Kiribati, New Zealand violated his right to life under Article 6 of the ICCPR, since New Zealand's authorities had not properly assessed the risks connected to his rejection.¹⁸⁷ The HRC, then, while evaluating the complaint in the merits, recalled that if on one side a broad interpretation can be applied to the protection of Article 6 (mainly the same interpretation made by the Committee in *Portillo Càceres v Paraguay*), on the other side there is a "high threshold" for proving that a real risk of violation exists.¹⁸⁸ In this regard, the Committee accepted the expert evidence that the sea level rise and the growing population in Kiribati have resulted in many dangerous consequences: 1) the reduction of habitable space, which have consequently caused many disputes among locals who could possibly put the claimant's life in danger;¹⁸⁹ 2) environmental degradation which have compromised the supply of potable water with the result that the 60% of the population can enjoy fresh water only due to rationed supplies.¹⁹⁰ However, the complaint was rejected on the merits by the HRC, who confirmed the lack of substantial grounds for a concrete violation of Article 6 of the Covenant and identified four scenarios in relation to which a real risk of harm to the right to life can be recognized. Firstly, the Court clarified that a general situation of violence such as the one occurred among the locals due to the reduction of habitable space, can only constitute a risk of real harm in the moment in which it is "personally" suffered by the individual in question who is exposed to a situation of vulnerability, but can't be considered as a harm as far as it stays linked to sporadic events of violence in which the applicant had never been personally threatened or involved. The second scenario clarified that a real risk can also be recognized when the supply of potable water

¹⁸⁷ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁸⁸ Oxford Human Rights Hub: Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law? Article by Adaena Sinclair-Blakemore - 28th January 2020

¹⁸⁹ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁹⁰ (Ibid.) Oxford Human Rights Hub: Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?

is so inaccessible or unsafe as to produce a *reasonably foreseeable* threat of a health risk which would cause a premature death or in any case influence the enjoyment of a right to life with dignity, but the case in question doesn't present enough information for an analysis based on foreseeable criteria.¹⁹¹ Thirdly, the Committee affirmed that the "lack of alternatives to subsistence livelihoods"¹⁹² can also heighten the risk for individuals to face the effects of climate change, but that in this regard the Committee needs as well to have more information in order to evaluate if at the moment of the rejection of the claimant by New Zealand there was a *reasonably foreseeable* risk that he would have been exposed to dangerous situations of water and food scarcity, indigence and extreme precarity which would have resulted in a threat to his right to life.¹⁹³ The fourth scenario illustrated by the Committee regards the claimant's assertion that his right to life is exposed to a threat due to the "overpopulation and frequent and increasingly intense flooding and breaches of sea walls".¹⁹⁴ The Committee clarified that both "sudden-onset events (such as floods and intense storms) and slow-onset events (sea level rise, land degradation)"¹⁹⁵ created by climate change can actually pose a real risk to the right to life which could have the effect of propelling cross-border movements of individuals seeking a shelter from climate-change related harms. In this regard, the HRC added that "without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 and 7 of the Covenant, thereby triggering the *non-refoulement*¹⁹⁶ obligations of sending States".¹⁹⁷ This is possibly the most significant passage of the Committee's decision, since for the first time the effects of climate change are *per se* considered as leading to a violation of individuals' right to life at the point that protection from *refoulement*

¹⁹¹ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁹² Teitiota v New Zealand (n.7) para 9.9.

¹⁹³ (Ibid) The Human Rights Committee, Environmental Protection and the Right to Life, Article from the author Ginevra Le Moli (July 2020).

¹⁹⁴ Teitiota v New Zealand (n.7) para 9.10.

¹⁹⁵ Teitiota v New Zealand (n.7) para 9.11.

¹⁹⁶ The non-refoulement principle, is a general principle of international law according to which it is prohibited to a country which receives asylum seekers to return them to a country in which they would be at risk of irreparable harm, including prosecution, torture, ill-treatment or other human rights violations.

¹⁹⁷ (Ibid.) Teitiota v New Zealand para 9.11.

is required; In other words, the decision affirms the principle according to which territorial States cannot return asylum seekers to their countries when they risk to suffer the severe consequences of climate change in their sending States, since in these circumstances their life conditions would be incompatible with the right to life with dignity, although excluding its violation in the concrete case. The Committee argued that in order for such a principle to be applied to this concrete case, “all the relevant facts and circumstances must be considered, including the general human rights situation in the claimant’s country of origin”;¹⁹⁸ according to the Committee, this examination is generally conducted by the State’s domestic organs, in order to determine whether a concrete and imminent risk actually exist. Done these observations, however, the HRC concluded that the principle in question cannot apply in the present case, confirming the domestic founding that the complaint lacks substantial grounds for a concrete violation of Article 6 of the Covenant. In fact, although the Committee recognized that climate change may in the future cause a real risk for the republic of Kiribati to be submerged under water resulting in population displacement, it considered this risk not an imminent one, as it would have been , for instance, “the risk of an entire country becoming (at present) submerged under water”;¹⁹⁹ according to the Committee, in fact, a risk like the latter would be extreme at the point that the conditions in such a country would probably become incompatible with the right to life with dignity before the risk is even realized.²⁰⁰ In the present circumstances, thus, the HRC considered the already existing efforts taken by the Government to address climate change through its “National Adaptation Programme of Acting” as sufficient, noting that there was still time for intervening acts by the Republic of Kiribati and the international community to limit the impacts of climate change, while by now, the Government was “already taking adaptive measures to reduce existing vulnerabilities and build resilience to climate-change related harms”.²⁰¹ Consequently, on the basis of the information made available by the claimant, the Committee was not in the

¹⁹⁸ Teitiota v New Zealand (n 7) para 9.3.

¹⁹⁹ (Ibid.) Teitiota v New Zealand para 9.11.

²⁰⁰ (Ibid.) Teitiota v New Zealand para 9.11.

²⁰¹ Teitiota v New Zealand (n 7) para 9.12.

position to conclude that the Republic of Kiribati violated his right to life under Article 6 of the Covenant. In conclusion, although the applicant's claim was rejected, this decision has been nevertheless considered as landmark, since it represents an important jurisprudential step forward in the protection of climate refugees under international human rights law and in the acknowledgement of environmental protection as a component of the right to life.

b) Climate Change Impacts on the Right to Health

Another human right which may be threatened and violated by climate change is the right to health. Clearly, all the climate change-related events which may cause a premature death resulting in a violation of the right to life are also the same events which could cause health prejudices and diseases as soon as the human activities above mentioned reach a harmful level. More specifically, the main climate change effects include global warming and extreme weather events: despite a substantial difference exists among these two trends (since the warming of the planet is a gradual process while the effects of extreme weather events such as heatwaves, floods, and droughts are immediate and acutely felt), both these phenomena can affect some of the most fundamental guarantors of human health, in particular clean water, food, air, shelter and freedom from disease.²⁰² This is confirmed by the IPCC Fifth Assessment Report (AR5), according to which climate change poses greater risks of injuries, diseases and death due to the increased heat and fire, severe risks of malnutrition due to the scarcity and availability of food and higher risks of water and food vector-borne diseases.²⁰³ The human right to health is protected widely under many international and

²⁰² World Health Organization (WHO), "*Protecting Health from Climate Change*" Report, (2008), available at "https://www.who.int/world-health-day/toolkit/report_web.pdf"

²⁰³ IPCC, Fifth Assessment Report (AR5), 2014.

regional treaties²⁰⁴ as well as under many national constitutions,²⁰⁵ and is considered an indispensable right for the enjoyment of all the other human rights.²⁰⁶ In Particular, it is enunciated in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognize that all persons have the right to “the enjoyment of the highest attainable standard of physical and mental health”:²⁰⁷ the Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the substantive content of this right as including “timely and appropriate health care, access to safe and potable water, adequate sanitation and supply of safe food, nutrition and housing, healthy occupational and environmental conditions”.²⁰⁸ In fact, as explained in the CESCR General Comment n. 14 on the right to the highest attainable standard of health under Article 12, States cannot by themselves ensure good health, not they can provide protection against every existing illness affecting human health, since genetical propension and natural susceptibility play an important role in the health status of every single individual; that’s why the notion of “highest attainable standard of health” should be considered as referring to the actions States can concretely take in order to guarantee such right, which regard mainly the access to “a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health”.²⁰⁹ Climate change is responsible of limiting the availability and access to all these fundamental components of the

²⁰⁴ UDHR, Article 25; CRC, Article 24; ICERD, Article 5(e)(iv); European Social Charter, Article 11; African Charter on Humans and Peoples’ Rights, Article 16; San Salvador Protocol, Article 10.

²⁰⁵ As of 2004, a right to health was contained in 73 national constitutions including Philippines, Argentina and India.

²⁰⁶ CESCR, General Comment n. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)

²⁰⁷ Article 12 of the ICESCR states: “(1) The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

²⁰⁸ “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study; Authors: Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani referring to the CESCR General Comment n. 14.

²⁰⁹ CESCR, General Comment n. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)

right to the highest attainable standard of health. The World Health Organization (WHO), has clarified which are the five major health consequences of climate change: first, since the agricultural sector is particularly sensitive to climate variability, food security is at risk in case of droughts and floods, especially in those country which are strictly dependent on rain-fed farming;²¹⁰ second, more frequent floods and storms can result in potential injuries and can be followed by outbreak of diseases (such as cholera), especially when water is contaminated and sanitation services are damaged or destroyed;²¹¹ third, the scarcity of water, essential for hygiene, and the excess of water due to rainfall floods are the principal causes of dysentery disease, which is already the second major infectious cause of childhood mortality, causing around 1.8 million deaths every year;²¹² Fourth, heatwaves can result in potentially deathly effects on elderly people, especially those with cardiovascular or respiratory diseases.²¹³ Lastly, the changing temperatures in general and the rainfall patterns are altering and increasing the geographical distributions of insects which are potential vectors of infections and diseases (among these, malaria and dengue are of greatest public health concern).²¹⁴ In other words, the effects of climate change would result and are resulting already in slowing, altering or reversing the progresses that the world health community is making against these diseases. Today, many Multilateral Environmental Agreements (MEAs) recognize and address the effects that climate change can have on human health.²¹⁵ The UNFCCC as well, in defining the “adverse effects” of climate change, makes clear that these include the “significant deleterious impacts on human health and welfare”²¹⁶ and that’s why it requires State parties to take into account health impacts in their social, economic and environmental policies.²¹⁷ All countries who have ratified international legal instruments containing obligations about climate change

²¹⁰ (Ibid.) WHO, “*Protecting Health from Climate Change*”, page 01.

²¹¹ (Ibid.) WHO, “*Protecting Health from Climate Change*”, page 01.

²¹² (Ibid.) WHO, “*Protecting Health from Climate Change*”, page 01.

²¹³ (Ibid.)

²¹⁴ (Ibid.)

²¹⁵ See the Convention on Long-Range Transboundary Air Pollution, Nov 13, 1979, 18 I.L.M 1442 Article 2; The Basel Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 38 I.L.M 1.

²¹⁶ UNFCCC Article 1(1).

²¹⁷ UNFCCC Article 4 (1)(f).

and/or the right to health, are obliged to implement these instruments and translate their obligations into national law.²¹⁸ Thus, according to the Office of the UN High Commissioner for Human Rights, as underlined in its Report to the thirty-second session of the Human Rights Council,²¹⁹ States are committed to adopt effective measures in order to prevent and remedy the negative effects that climate change has on the right to health, including with regard to the environmental and social determinants of health.²²⁰ These findings have been explicitly confirmed by the Committee on the Rights of the Child in its General Comment n. 15 on the right of children to the highest attainable standard of health, where the Committee has stressed the necessity for States to adopt measures in order to face the several threats that environmental pollution poses to children's health in many aspects and the necessity to implement environmental interventions to address climate change as it is one of the major threats to children's health which has the effect of creating many disparities.²²¹ All these resolutions and legal instruments contribute to create a normative and political basis for the integration of human rights, and in particular of the right to health, to climate action; the consequence is that a failure from States to take urgent action through the adoption of mitigation and adaptation measures in order to protect the most vulnerable ones from the negative impacts of climate change,

²¹⁸ Office of the United Nations High Commissioner for Human Rights 29 August 2016: Response to UNFCCC Secretariat request for submissions on: Nairobi Work Programme on impacts, vulnerability and adaptation to climate change - health impacts, including occupational health, safety and social protection, FCCC/SBSTA/2016/2, para 15(a) (i)., ; Submission - regarding the Nairobi Work Programme on impacts, vulnerability and adaptation to climate change - of the OHCHR on findings and conclusions of the Report of the Office of the High Commissioner for Human Rights (OHCHR) to the thirty-second session of the Human Rights Council (HRC), "*Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*", 6 May 2016, A/HRC/32/23. Available at ["https://unfccc.int/files/parties_observers/submissions_from_observers/application/pdf/676.pdf"](https://unfccc.int/files/parties_observers/submissions_from_observers/application/pdf/676.pdf)

²¹⁹ The Report of the Office of the High Commissioner for Human Rights (OHCHR) to the thirty-second session of the Human Rights Council (HRC), titled: "*Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health*", 6 May 2016, A/HRC/32/23, was submitted pursuant to HRC resolution 29/15, in which the Council requested OHCHR to conduct a detailed analytical study, in consultation with relevant stakeholders, on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

²²⁰ (Ibid.) Office of the United Nations High Commissioner for Human Rights 29 August 2016: Response to UNFCCC Secretariat request for submissions on Nairobi Work Programme.

²²¹ (Ibid.) Office of the United Nations High Commissioner for Human Rights 29 August 2016: Response to UNFCCC Secretariat request for submissions on Nairobi Work Programme.

thus constitutes a breach of States human rights obligations and threatens the enjoyment of the right to health for all.²²²

Part B Indirectly involved Human Rights: Impact on Livelihoods and Natural Resources

a) Climate Change Impacts on the Right to Food

The right to food is articulated by the ICESCR as a component of the right to an adequate standard of living, provided under Article 11 of the Covenant. The 2nd paragraph of Article 11, in fact, upholds “the fundamental right of everyone to be free from hunger”²²³ and stresses the necessity for States to act individually or through international cooperation in order to “ensure an equitable distribution of world food supplies in relation to need”.²²⁴ The enjoyment of the right to food is necessary for granting to every human person an inherent dignity and it is fundamental for the fulfillment of other human rights²²⁵ contained in the International Bill of Rights.²²⁶ In the global climate change regime, there is a general consensus that climate change represents a threat to the right to food, with

²²² OHCHR, Key Messages on Human Rights and Climate Change. (2015).

²²³ ICESCR, Article 11(2). Article 11 provides, in full: “(1) The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. (2) The States parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

²²⁴ ICESCR, Article 11(2)(b).

²²⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, available at: <https://www.refworld.org/docid/4538838c11.html>.

²²⁶ The International Bill of Rights results in the three major international human rights treaties: The Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (ICCPR, 1966) with its two Optional Protocols; The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

disproportionate impacts on the most vulnerable ones who have contributed the less to the global warming and are more severely suffering for its effects. A recent study demonstrates that the increasement in the number of people at risk of hunger in case of a 2-3 Celsius degrees rise is about 30-200 million, while this number rises up to 250-550 million beyond 3 Celsius degrees.²²⁷ Today, around 800 million people are already at risk of hunger.²²⁸ The impact that climate change has on food security has been recognized also by the UNFCCC, Article 2, according to which the GHG stabilization in the atmosphere should be achieved within a time frame which is sufficient enough for ecosystems to adapt to climate change naturally, in order to “ensure that food production is not threatened”.²²⁹ According to the Committee on Economic, Social and Cultural Rights (CESCR), “even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals”;²³⁰ In its General Comment No.12 the CESCR stated that availability, accessibility and adequacy are necessary elements for the enjoyment of the right to food and recognized that there is an inter-dependence between the environment and this right; availability relates to the fact that, in order to satisfy the needs of the population, it’s necessary to provide sufficient food coming both from natural resources and from the market, but due to the rising temperatures and the more frequent extreme weather events, the negative effects of climate change on the various sources of production (crops, livestock, fisheries, agriculture in general) may result in a reduction of food availability at a global scale. In fact, as the UN Special Rapporteur on the right to food noted in its Interim Report to the General Assembly of the UN: “an increase of just 1°C in temperature can have devastating effects on crop yields and the ability to maintain current levels of agricultural production”.²³¹ Current climate change

²²⁷ Stern, Nicholas, Stern Review on the Economics of Climate Change (Oct. 30, 2006).

²²⁸ (Ibid.) Stern, Nicholas, Stern Review on the Economics of Climate Change.

²²⁹ UNFCCC, Article 2.

²³⁰ (Ibid.) CESCR, General Comment No. 12 on the Right to Adequate Food.

²³¹ Interim Report of the Special Rapporteur on the right to food, Hilal Elver, submitted in accordance with the UN General Assembly resolution 69/177. (2015)

international negotiations within the UNFCCC are trying to avoid projections of a 2°C increase becoming a reality. Anyway, the existing measures are not adequate considering that in some regions of the planet climate change is already having devastating impacts: this is, for instance, the case of the Sub-Saharan Africa where temperatures in summer are already so high that they are estimated to reach the 5°C by 2100.²³² Also, the rapidity at which glaciers are melting will lead to an increase of sea levels up to 2 meters by 2100,²³³ causing inundations of the coastal agricultural zones and increasing the salinization of available water for agricultural productions, thereby reducing food availability in the coastal areas and river deltas where the 60% of the world's populations lives. As a result, people climate-induced migrations in order to find food-secure places are expected to occur more frequently.²³⁴ For what regards accessibility, first to say it that it deals with both the physical and economic access. Physical access refers to the fact that all persons should have the access to food, including the most vulnerable ones (children, older people and people with disability); economic access means that food shouldn't be expensive at the point that acceding to it would compromise the access to other essential needs such as health care and housing. Climate change has negative impacts also on food accessibility, since changes in the productions of food and their quality can affect the market with the consequence of raising prices thus limiting the accessibility to food, especially for the poorest ones. Indeed, as stressed by the UN Special Rapporteur on the right to food: "sharp price increases for all major crops can be expected as a result of climate change accompanied by population growth, changing diets and increasing demands for non-food crops".²³⁵ Despite the difficulty in predicting the market trend and prices, the IPCC has emphasized with confidence that the

²³² Potsdam Institute for Climate Impact Research and Climate Analytics, 4^o: Turn Down the Heat: Climate Extremes, Regional Impacts, and the Case for Resilience (Washington, D.C., International Bank for Reconstruction and Development/The World Bank, 2013).

²³³ United Nations Development Programme, Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience (New York, 2014).

²³⁴ (Ibid.) Interim Report of the Special Rapporteur on the right to food, Hilal Elver, submitted in accordance with the UN General Assembly resolution 69/177. (2015)

²³⁵ (Ibid.) Interim Report of the Special Rapporteur on the right to food, Hilal Elver, submitted in accordance with the UN General Assembly resolution 69/177. (2015)

global prices of food will rise substantially by 2050.²³⁶ Finally, adequacy is also another necessary element of the enjoyment of the right to food. It requires food to be adequate for the satisfaction of dietary needs (which depend on a person's age, on the living conditions, health status etc.), and safe for human consumption (free from toxic substances, nutritious, socially acceptable).²³⁷ The IPCC'S Fifth Assessment Report, clarifies that over time, climate change will have a substantial negative impact on the *per capita* calorie availability (which is expected to decline by 2050 in the developing world), increasing undernutrition and stunting especially among children and so provoking a rise of the nutrition-related deaths of children in developing countries. Moreover, the AR5 recognize that climate change will be reducing food quality and water availability, thus contributing to the spread of infectious vector-borne diseases and intestinal infections, while at the same time the storage of food will become problematic due to a warmer weather.²³⁸ Under the ICESCR, State Parties have a duty to respect, protect and fulfill the right to food. In particular, the obligation to fulfill the right to adequate food, requires State to implement policies which ensure the enjoyment of this right and provide for the access to it. As a consequence, States must also avoid adopting policies which could limit or procure negative effects on the right to food. It is the case of some policies which have been promoted in order to mitigate climate change, regarding the use of technology-driven solutions for agricultural production in response to the many challenges that food productions can face due to climate change and population growth.²³⁹ As the Special Rapporteur on the right to food has noted, the use of bio fuels as a substitution to high GHG emitting fossil fuels is one of the policies in question: in fact, "the use of food and feed crops for fuel could have the result of boosting the role of energy markets in determining the value of agricultural commodities

²³⁶ Intergovernmental Panel on Climate Change, 2014: Impacts, Adaptation, and Vulnerability: Summary for Policymakers: Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2014).

²³⁷ (Ibid.) Interim Report of the Special Rapporteur on the right to food, Hilal Elver, submitted in accordance with the UN General Assembly resolution 69/177. (2015)

²³⁸ IPCC Fifth Assessment Report (AR5), 2014.

²³⁹ De Shutter, Oliver, Report of the Special Rapporteur on the Right to Food: Building Resilience: a Human Rights Framework on World Food and Nutrition Security, U.N. Doc A/HRC/9/23 (Sept. 8, 2008).

which are direct or indirect substitutes for biofuel feed stocks.”²⁴⁰ Consequently, on a downward trend, food prices could increase once again affecting accessibility to the right to food.²⁴¹ In this regard, the CESCR has stressed that States must adopt strategies to fight climate change which won’t result in negatively affecting the right to adequate food and freedom from hunger, but rather in promoting sustainable agriculture.²⁴² In conclusion, then, as stressed by the Special Rapporteur on the right to food, “while States should do more to mitigate climate change, it is also important that, in the measures they adopt to ensure such mitigation, they comply with their human rights obligations”.²⁴³

b) Climate Change Impacts on the Right to Water

The right to water is not in itself a self-standing right,²⁴⁴ but instead it is inexorably connected to other human rights such as the right to an adequate standard of living, the right to adequate food and housing, and the right to the highest attainable standard of health;²⁴⁵ the connection among these rights has been upheld by the CESCR in its General Comment No. 15, where it recognized that the right to water, despite not explicitly included in the ICESCR, nonetheless

²⁴⁰ “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study; Authors: Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani.

²⁴¹ (Ibid.) “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study.

²⁴² UN Committee on Economic, Social and Cultural Rights (CESCR), *The world food crisis: statement*, 20 May 2008, E/C.12/2008/1, available at: <https://www.refworld.org/docid/4a54bc08d.html>.

²⁴³ Contribution of the Special Rapporteur on the right to food, Mr Olivier De Schutter, to the meeting convened by the Friedrich-Ebert-Stiftung with the Committee on Economic, Social and Cultural Rights, Geneva, May 13th, 2010.

²⁴⁴ References to the right to water can be found in CEDAW Article 14(2)(h); CRC Article 24(2)(c); Geneva Convention relative to the Treatment of Prisoners of War Articles 20, 26, 29 & 46; Geneva Convention relative to the Treatment of Civilian Persons in Time of War Articles 85, 89 & 127.

For a direct evidence of the right to water see CESCR General Comment No. 15; Guissé, El Hadji, Report of the Special Rapporteur of the Sub-Commission on the Right to Drinking Water Supply and Sanitation on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation U.N. Doc E/CN.4/ Sub.2/2002/10 (2002); Preamble, United Nations Water Conference, Mar. 14-25, 1977, Mar Del Plata Action Plan (Mar. 1977); United Nations International Conference on Population and Development, Sept. 5-13, 1994, Program of Action Report, 5-13 September 1994, U.N. Doc DPI/1618/POP (March 1995).

²⁴⁵ CESCR, General Comment No. 15: The Right to Water, E/C.12/2002/11 (2003).

falls within the categories of guarantees necessary for ensuring an adequate standard of living.²⁴⁶ More precisely, the CESCR specifies the content of the right to water affirming that it “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.²⁴⁷ Similarly to the right to food, the human right to water is indispensable for living in human dignity and is as well a prerequisite for the enjoyment of other human rights. Due to the inter-dependence which exist among the human rights in this analysis, (as said, the right to water is connected to the rights to an adequate standard of living, of adequate food and housing and the right to health) when climate change undermines one of these rights, it may consequently undermine the others; at the same time the realization of one of these rights can create beneficial developments in another. In a context in which billions of people already lack the access to safe drinkable water and in which another 2.5 billion people don’t have access to sanitation, climate change constitutes a big obstacle to the fight for guaranteeing the enjoyment of the right to water and represents a real human rights concern.²⁴⁸ In fact, climate change will have the effect of aggravating even more the existing threats to freshwater resources (such as population growth and the consequent rising demand for water) and despite the considerable variety of scenarios which could be predicted in relation to the impact of climate change on water resources, it is clear that climate change will have the effect of both increasing water scarcity through the changes in temperature (especially in already dry areas and arid regions), and undermining water quality in areas flooded by rain or sea water (i.e. coastal zones, deltas and small islands).²⁴⁹ These predictions are confirmed by the Fifth Assessment Report (AR5) of the IPCC, according to which “climate change is projected to reduce renewable surface water and groundwater resources in most dry

²⁴⁶ (Ibid.) CESCR, General Comment No. 15: The Right to Water, E/C.12/2002/11 (2003).

²⁴⁷ (Ibid.) CESCR, General Comment No. 15: The Right to Water, E/C.12/2002/11 (2003), paragraph 2.

²⁴⁸ “*Climate Change and the Human Rights to Water and Sanitation*”, Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, available at https://www2.ohchr.org/english/issues/water/iexpert/docs/climatechange_hrtws.pdf”.

²⁴⁹ Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “*Climate Change, right to water and sanitation*”, final document available at https://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf”

subtropical regions [...] intensifying the competition for water”;²⁵⁰ and at the same time it will increase the risk of water scarcity in “rural areas, which are expected to experience major impacts on water availability and supply”.²⁵¹ Contamination of drinking water and aggravation of the spread of diseases are also among the main negative consequences of climate change. According to the Stern Review,²⁵² even a 1°C rise in temperature would negatively impact water supplies for 50 million people, while a 5°C could seriously result in the disappearance of various Himalayan glaciers consequently threatening water shortages for a quarter of China’s population, and hundreds of millions of Indians.²⁵³ As with the other economic, social and cultural rights, States are obliged under the ICESCR to respect, promote and fulfill the right to water albeit not a self-standing right. Similarly, to the right to food, the normative content of the obligations relating to the right to water has to be seen in terms of availability, accessibility, quality and affordability. Availability means States must ensure every individual has sufficient water for personal and domestic use, and sufficient sanitation facilities: climate change can mean additional stress on water resources therefore increasing the competition over limited resources.²⁵⁴ Accessibility means ensuring the resilience of water and sanitation infrastructures, which need to be reinforced and flexible: climate change threatens the physical accessibility to water sources and sanitation facilities (i.e. floods and droughts can deteriorate existing water and sanitation infrastructures, and long-term rainfalls can make the groundwater levels rise, decreasing the efficiency of natural purification of water which in turn increases the risks of infectious disease).²⁵⁵ Quality: climate change can also negatively impact the quality of water, since all the climate-

²⁵⁰ IPCC, Fifth Assessment Report AR5, p. 13. (2014). *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

²⁵¹ (Ibid.) IPCC, AR5, pp. 15 – 16.

²⁵² The Stern Review on the Economics of Climate Change is a 700-page report released by the economist Nicholas Stern for the Government of the United Kingdom on 30 October 2006.

²⁵³ Stern, Nicholas, Stern Review on the Economics of Climate Change (Oct. 30, 2006). *supra* note 218.

²⁵⁴ (Ibid.) Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “*Climate Change, right to water and sanitation*”, final document available at https://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf

²⁵⁵ (Ibid.) Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “*Climate Change, right to water and sanitation*”

related extreme weather events may result in a contamination of water increasing the presence of micro-organisms, toxic and chemical substances and radiological hazards in the drinkable water. Finally, affordability relates to the fact that States must ensure that additional costs to water do not cause discriminations rendering the access to water and sanitation unequal and unaffordable: by heightening the demand and competition over available water, climate change may indirectly result in an increase of the prices of water.²⁵⁶ It is important to notice that, as much as the direct impacts of climate change itself, climate change mitigation policies (i.e. reducing GHG emissions by applying green technologies) and adaptation policies (i.e. expansion of rain-water storage) may have several implications for the realization of the right to water in some circumstances:²⁵⁷ for instance, it has been argued that international community's mitigation efforts should include investments in biofuels; however, as noted by the World Development Report 2010, the use of biofuels seem to be problematic for both food resources (since the use of biofuels would displace large areas of forests and grasslands and compete with the agricultural production of food) and water resources (since, even a generation of bio-fuels which relies on non-food crops, if on one side may reduce the competition with agriculture, on the other side it still may result in a loss of grassland ecosystems competing with water resources).²⁵⁸ As far as the implications of climate policies are concerned, ensuring the right to water must focus on the normative requirements of availability, accessibility, quality and affordability. In this regard, when dealing with mitigation and adaptation policies, States have positive and negative obligations to comply with in order to ensure the enjoyment of the right to water: first, they must abstain from interfering with the existing access to water; the standard of a safe, accessible and affordable water must not be compromised, but

²⁵⁶ (Ibid.) Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, "*Climate Change, right to water and sanitation*"

²⁵⁷ The Human Right to Water, Theory, Practice and Prospects, Article by Marc Darrow, edited by Malcolm Langford and Anna F. S. Russell, University of Oxford. Publisher: Cambridge University Press, online publication date September 2017; available at: "<https://www.cambridge.org/core/books/human-right-to-water/climate-change-and-the-right-to-water/BIA08468680E1A1B1628DA03594A4C53/core-reader>"

²⁵⁸ World Development Report 2010, *Summary at p. 16. See also United Nations, World Water Development Report No. 3, p. 68, and Food and Agriculture Organisation (FAO), The Right to Food and the Impact of Liquid Biofuels (Agrofuels) (2008).*

instead realized for everyone as ultimate aim; the State should also inhibit third parties (such as transnational corporations) from violating the normative standards of the right to water for example through the application of pricing policies which would put essential services and adaptation measures out of the range of the poorest communities.²⁵⁹

c) Climate Change Impacts on the Right to Adequate Housing

In the list of the many human rights threatened by climate change there is also the right to adequate housing. States are obliged to take steps towards the realization of the right to adequate housing under many international and regional legally binding human rights instruments;²⁶⁰ in particular, under the ICESCR, similarly to what previously observed for the right to food, the right to adequate housing is recognized as a necessary component of the right to an adequate standard of living (Article 11) and its content is specified by the CESCR, which describes it as “the right to live somewhere in security, peace and dignity”.²⁶¹ According to the CESCR,²⁶² the core substantive elements of this right include “security of tenure, protection against forced evictions, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy”.²⁶³ Climate Change threatens the right to housing

²⁵⁹ (Ibid.) Position Paper of the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, “*Climate Change, right to water and sanitation*”

²⁶⁰ see Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights (article 11); the Convention on the Rights of the Child (article 27, para. 3); the non-discrimination provisions found in article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women; article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 43.1 (d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and article 28 of the Convention on the Rights of Persons with Disabilities; at the regional level, see the European Social Charter (1961), the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”) and the African Charter on Human and Peoples’ Rights (1981).

²⁶¹ CESCR General Comment No.12.

²⁶² (Ibid.) CESCR General Comment No.12; also see CESCR General Comment No.7 on Forced Evictions.

²⁶³ “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study; Authors: Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani. Available at:

in many different ways. In particular, by increasing the severity and frequency of extreme weather events such as rainstorms, cyclones and hurricanes, climate change poses specific risks to cities and small settlements²⁶⁴. According to the IPCC, the most direct threats are connected to floods and landslides which result from intense rainfalls, sea level rise and storms:²⁶⁵ in fact, all these precipitations can damage urban drainage systems causing localized flooding which in turn have the effect of weakening the already damaged infrastructures.²⁶⁶ Moreover, as noted by the Special Rapporteur in its 2nd Report to the UN General Assembly: “when shelters are built in areas susceptible to hazards, such as in floodplains on the banks of rivers or on slopes that pose the risk of erosion and mudslides during heavy rains, the consequences can be devastating”.²⁶⁷ The extent of the damages caused to the urban settlements by extreme weather events is not only related to houses and locations but also to the quality and the level of infrastructures and service provision: poorest communities are the most vulnerable and exposed to climate change-related disasters, since, living in situations of poverty and exclusion, they lack the adequate resources to protect themselves, especially when they live in unserviced settlements within urban areas which very often are built on hazardous sites. According to the UN Human Settlements Programme (UN-Habitat), about 1 billion people in the world today are slum-dwellers, the majority of them living in developing countries (especially sub-Saharan Africa and Southern Asia) where they constitute the 42 percent of the urban population.²⁶⁸ These people usually live in informal settlements located in hazardous areas within cities, and at risk from flooding and landslides; despite these areas are constantly affected and exposed to earthquakes, flooding and

["https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1&isAllowed=y"](https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1&isAllowed=y)

²⁶⁴ Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/64/150, 6 August 2009.

²⁶⁵ Intergovernmental Panel on Climate Change, “Industry, settlement and society”, in *Climate Change 2007: Impacts, Adaptation and Vulnerability*, p. 361.

²⁶⁶ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁶⁷ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁶⁸ UN-Habitat, “Key findings and messages”, in *Global report on human settlements 2007: Enhancing Urban Safety and Security*.

landslides they still attract the poorest due to the cheaper land and housing costs.²⁶⁹ In contexts like these, the disasters caused by extreme-weather events do not simply depend from nature and its alterations, but yet they reflect the failure of States in managing development policies.²⁷⁰ However, where there is already a lack of protective infrastructures and services, climate change is responsible of aggravating human vulnerability to extreme-weather events: it has been noted, for instance, that “it is generally cities with the largest inadequacies in protective infrastructure that have experienced the highest number of flood-related deaths and injuries over the last 25 years”,²⁷¹ and, as added by the UN-Habitat,²⁷² “a total of 98 percent of the 211 million people affected by natural disasters during the period from 1991 to 2000 were in developing countries”.²⁷³ Another effect which would result from the impact of climate change on the right to housing (as well as on the other rights-components of the right to an adequate standard of living) is displacement and human migration. According to many studies, the number of people most likely to be displaced due to climate change by 2050 goes from 50 to 250 million.²⁷⁴ Migration inside and outside the borders, in fact, would be the last remedy for many vulnerable people who suffer the lack of basic shelter and other resources to survive in the contexts described; however, since the ability to migrate is a faculty of movement which needs both financial and social contributions, not all those affected by climate change will have the possibility to leave: as a consequence, “those unable to move away from the negative effects of climate change - whether due to poverty, insecurity, disability and other factors - will find their right to adequate housing most acutely

²⁶⁹ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁷⁰ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁷¹ Caroline Moser and David Satterthwaite, Human Settlement Discussion Paper Series, Theme: Climate Change and Cities — 3, Pro-poor climate change adaptation in the urban centres of low- and middle-income countries (International Institute for Environment and Development, October 2008), p. 9.

²⁷² UN-Habitat, Global report on human settlements 2007.

²⁷³ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁷⁴ See Stern Review, at 77 describing 250 million as a “conservative” assumption and, more generally, McAdam, Jane & Ben Saul, *Weathering Insecurity: Climate-Induced Displacement and International Law*, in *“Human Security and Non-Citizens: Law, Policies and International Affairs”* (Alicia Edwards & Carla Ferstman eds., 2009).

threatened”.²⁷⁵ Under international human rights law, and as with the other Economic, Social and Cultural rights, States are obliged to respect, protect and fulfill the right to adequate housing and to pursue global solution to the global problem of climate change and its impacts on housing through international cooperation.²⁷⁶ Moreover, as the Office of the High Commissioner for Human Rights observed in its 2009 report, human rights guarantees in the context of the right to housing as affected by climate change include: “1) adequate protection of housing from weather hazards (habitability of housing); 2) access to housing away from hazardous zones; 3) access to shelter and disaster preparedness in cases of displacement caused by extreme-weather events; 4) protection of communities which are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons”.²⁷⁷ It appears therefore necessary to take into account international human rights standards to address the many challenges posed by climate change.²⁷⁸

Part C Indirectly Involved Human Rights: impacts on Development and Self-Determination

a) Climate Change Threatens the Right to Development

The right to development is a relatively new concept in international human rights law,²⁷⁹ and despite there are several references to this right in many core

²⁷⁵ “*Human Rights and Climate Change*” a review of the international legal dimensions; A World Bank study; Authors: Siobhan McNerney-Lankford, Mac Darrow, and Lavanya Rajamani. Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/2291/613080PUB0Huma158344B09780821387207.pdf?sequence=1&isAllowed=y>”

²⁷⁶ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁷⁷ United Nations Office of the High Commissioner for Human Rights, Report on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

²⁷⁸ (Ibid.) Report submitted to the UN General Assembly in accordance with Human Rights Council resolution 6/27 by the Special Rapporteur on adequate housing.

²⁷⁹ Mukherjee V, Mustafa F. 2019. Climate change and right to development. Management and Economics Research Journal, Vol. 5, Article ID 735041, 10 pages. Available at: <https://doi.org/10.18639/MERJ.2019.735041>”

international human rights treaties,²⁸⁰ it is possible to affirm that the concretization of this right and its formal recognition have been actualized with the passing of the United Nations Declaration on the Right to Development (DRD) in 1986.²⁸¹ The DRD defined the meaning of development as an economic, social and political process, aimed at improving the well-being of all individuals and the population “on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”.²⁸² As a consequence, the right to development is considered as an “inalienable human right by the virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized”.²⁸³ Keeping in mind these considerations, it is therefore possible to identify a linkage between climate change and its negative impacts on the right to development. In fact, as observed in the analysis provided in this chapter, climate change poses a direct threat to the human rights of people, especially in those countries which are homes to a great number of marginalized and vulnerable people who are often unable to protect themselves from the many negative impacts of climate change, and, if it’s true that the right to development is a process necessarily composed by the full realization of all human rights and fundamental freedoms, it is further possible to affirm that climate change poses an existential threat to people’s enjoyment of their right to development. These findings can be confirmed by looking at the same core components of the right

²⁸⁰ Before the DRD, the UN Charter, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), had already acknowledged the close relationship between development and human rights: see Article 55 of the UN Charter, according to which States should promote “conditions of economic and social progress and development”; The ICESCR emphasize at Article 1 that all peoples should “freely determine their political status and freely pursue their economic, social and cultural development”.

²⁸¹ (Ibid.) Mukherjee V, Mustafa F. 2019. Climate change and right to development. Management and Economics Research Journal.

²⁸² Declaration on the Right to Development, G.A. Res. 41/128 (Dec. 4, 1986), annex 41 UN GAOR Supplement. (No. 53) 186, U.N. Doc. A/41/53 (1986) [hereinafter DRD or Declaration], at Preamble, para. 2. The UN has moved towards integrating social and cultural elements into the concept of development by introducing the Human Development Index, which is used to measure progress toward development. However, as pointed out by Stephen Marks, the meaning of development, in general perception and practice, has been limited to the capacity of consumption and accumulation and does not incorporate cultural components. See Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J 137, 164 (2004).

²⁸³ Declaration on the Right to Development (DRD), Article 1(1).

to development as identified by the Working Group on the right to development in occasion of its Seventh Session in Geneva (January 2006).²⁸⁴ These include, in particular:²⁸⁵ a) *respect for all human rights* (the DRD collocates the human person at the center of the development considering also that the realization of the right to development cannot justify any violation of other human rights);²⁸⁶ b) *participation* (the DRD considers the human person as an active participant of the right to development);²⁸⁷ c) *equality of opportunities and non-discrimination* (according to the DRD, all States must respect the observance of “all human rights and fundamental freedoms for all without distinctions of race, sex, language or religion”,²⁸⁸ and must ensure equality of opportunities for all in the access to health, education, food, housing and to the other basic resources and services);²⁸⁹ c) *social justice* (the DRD considers that the development process shall promote social justice and the fair distribution of the benefits of the development for individuals);²⁹⁰ d) *international cooperation* (According to the DRD, international cooperation is the key in order to assist developing countries in ensuring the enjoyment of basic human rights²⁹¹).²⁹² The nature of the right to development has been largely debated, especially in relation to the issues of who are the duty-bearers, and who the rights-holders. In these regards, the DRD has specified that the rights-holders are all the individuals, since the human person is considered the center of the development and is at the same time the active

²⁸⁴ The Open-ended Working Group on the right to development was created by the Commission on Human Rights through its resolution Res. 1998/72, U.N. Doc. E/CN.4/1998/72 (1998). The Commission on Human Rights established the Open-ended Working Group on the Right to Development with the mandate to monitor and review progress made in the promotion and implementation of the right to development, as elaborated in the Declaration on the Right to Development, at the national and international levels.

²⁸⁵ Report of the Working Group on the Right to Development on its Seventh Session (Geneva, 9-13 January 2006), E/CN.4/2006/26, (February 22, 2006) at para. 40.

²⁸⁶ Vienna Declaration, UN General Assembly 12 July 1993, A/CONF.157/23, para. 10: “While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”

²⁸⁷ DRD, Article 2(1).

²⁸⁸ (Ibid.) DRD, Article 6(1).

²⁸⁹ (Ibid.) DRD, Article 8(1).

²⁹⁰ (Ibid.) DRD, Article 2(3)

²⁹¹ MARGOT E. SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW*, 143 (2007).

²⁹² Paper by the Center for International Environmental Law (CIEL) for the High-Level Task Force (HLTF) on the Implementation of the Right to Development, established by the Open-ended Working Group on the Right to Development created by the (former) Commission on Human Rights.

participant and the beneficiary of the right to development.²⁹³ Analogously, according to the DRD, States have the prior responsibility and positive duty to implement the right to development at a national level²⁹⁴ and to cooperate with other States at the international level;²⁹⁵ they have also a negative duty to avoid interferences with the enjoyment of this right. Individuals are also considered duty-bearers in the light of the fact that they are required to be active participants to the right to development and to act collectively. The right to development is generally contemplated as addressing the economic imbalances which exist between the industrialized and developing worlds.²⁹⁶ In fact, human rights and economic development are inextricably related at the point that the realization of one without the other would be difficult or ineffective. In this context, climate change becomes once again a discordant note if one considers that its effects are not just only of environmental concern, but they have economic implications as well. In fact, historically, developed countries have been the major GHG emitters leading to an anthropogenic-made climate change: they developed at the cost of the environment. As a consequence, developing countries, which are the ones who contributed the less to climate change, are the ones who suffer the most for its effects; that's why the developing countries expressed their discontent in relation to the greater liability imposed upon them by the "*common but differentiated responsibility*" principle created by the UNFCCC in order to address the climate crisis, since it poses "a political expectation that the climate change regime must contain greater symmetry in the commitments in contrast to differentiation"²⁹⁷ (it is enough to say that the Paris Agreement as well, being a

²⁹³ DRD, Article 2(1).

²⁹⁴ DRD, States' duties at national level: Articles 2 para. 3; 3 para. 1; 5; 6 paras. 2 and 3; 8, paras. 1-2.

²⁹⁵ DRD, States' duties at the international level: Articles 3, para. 3; 4, para. 1 and 2; 6, para. 1; 7. 41.

²⁹⁶ Paper by the Center for International Environmental Law (CIEL) for the High-Level Task Force (HLTF) on the Implementation of the Right to Development, established by the Open-ended Working Group on the Right to Development created by the (former) Commission on Human Rights. A/HRC/15/WG.2/TF/CRP.3/Rev.1 Author: Marcos A. Orellana, Senior Attorney from Chile, Director of the Human Rights and Environment Program and the Trade and Sustainable Development Program at the Center for International Environmental Law (CIEL) in Washington DC and Geneva. The author is indebted to the Right to Development Unit of the Office of the High Commissioner for Human Rights and the High-Level Task Force on the Implementation of the Right to Development for their comments and support, as well as to Mr. Daniele Violetti of the UNFCCC Secretariat for his comments and review. Available at: "https://www.ciel.org/Publications/Climate_Development_Jan10.pdf"

²⁹⁷ Mukherjee V, Mustafa F. 2019. Climate change and right to development. Management and Economics Research Journal, Vol. 5, Article ID 735041, 10 pages. Citing Winkler and Rajamani, 2014.

Conference of the Parties of the UNFCCC and thus following the same principles, does not make any clear distinction between developed and developing countries). It has been argued that this dilution of the differentiated responsibility between developed and developing nations constitutes a violation of the right to development in itself as enjoyed by developing countries.²⁹⁸ Hence, since the global north is historically responsible for climate change, it should have (and actually has, under the principle of Common but Differentiated Responsibilities) the moral and legal obligation to take concrete steps in order to face the impacts of climate change, especially in developing countries: the urgency of the climate situation requires the international community not to forget its responsibility towards the developing and underdeveloped nations. In this context, the formulation by the international community of development models which ensure a sustainable development has a vital importance in order to avoid human rights violations of the most vulnerable.²⁹⁹ Moreover, the “process of development” should be carried out according to a *human rights-based approach*, which means according to human rights law standards (namely transparency, participation, non-discrimination and accountability, which will be further discussed)³⁰⁰ instead of according to the approach generally maintained by industrialized countries and financial institutions, which is based on the idea that development should focus on the eradication of poverty rather than on the respect and protection of human rights.³⁰¹ In fact, a rights-based approach would place human rights at the center of development focusing on the protection, promotion and fulfillment of all human rights, and providing as a consequence for a more inclusive and participatory process which ensures the respect of all stakeholder’s rights. In conclusion, it is possible to affirm that the integration of the right to development in the context of climate change has both ethical and

²⁹⁸ (Ibid.) Mukherjee V, Mustafa F. 2019. Climate change and right to development. Management and Economics Research Journal, Vol. 5, Article ID 735041, 10 pages. Citing Winkler and Rajamani, 2014.

²⁹⁹ (Ibid.) Mukherjee V, Mustafa F. 2019. Climate change and right to development. Management and Economics Research Journal, Vol. 5, Article ID 735041, 10 pages.

³⁰⁰ (Ibid.) Paper by the Center for International Environmental Law (CIEL) for the High-Level Task Force (HLTF) on the Implementation of the Right to Development, established by the Open-ended Working Group on the Right to Development created by the (former) Commission on Human Rights.

³⁰¹ S. Nwauche & J.C. Nwobike, Implementing the Right to Development, E2 SUR – INT’L J. on Hum Rts. 93, 96 (2005).

practical advantages:³⁰² from an ethical point of view, it offers a vision oriented to sustainable developments goals (which has found a broad consensus in the international panorama, at the point that sustainable development goals,³⁰³ further discussed in Chapter IV, finally prevailed over the old Millennium Development Goals³⁰⁴ (MDGs)) and invokes a pressing obligation on the international community to “ensure equity by allowing the developing nations to claim their equitable share of development”;³⁰⁵ from a practical point of view, on the other side, the right to development may help climate change action “to work on something tangible such as rights involving individuals”.³⁰⁶

b) Climate Change Threatens the Right to Self-Determination

Self-determination is a fundamental principle in international law and is considered as amounting to a *jus cogens* norm, meaning a peremptory norm³⁰⁷ of international law which does not allow any derogation. The right of people to self-determination is enshrined in the opening chapter of the UN Charter, where the respect of this right is presented as one of the purposes of the United Nations,³⁰⁸ and it is also affirmed in Article 1 of the ICESCR and the ICCPR

³⁰² (Ibid.) Paper by the Center for International Environmental Law (CIEL) for the High-Level Task Force (HLTF) on the Implementation of the Right to Development, established by the Open-ended Working Group on the Right to Development created by the (former) Commission on Human Rights.

³⁰³ The Sustainable Development Goals (SDGs) are a collection of 17 interlinked goals designed to be a "blueprint to achieve a better and more sustainable future for all". The SDGs were set in 2015 by the United Nations General Assembly and are intended to be achieved by the year 2030.

³⁰⁴ The Millennium Development Goals (MDGs) were UN goals which all the 193 adherent States agreed to reach by the year 2015. Among these, there are the objective of eradicating poverty and world's hunger, reducing children mortality, and guaranteeing gender equality and women's autonomy.

³⁰⁵ (Ibid.) Mukherjee V, Mustafa F. 2019. Climate change and right to development. *Management and Economics Research Journal*, Vol. 5, Article ID 735041, 10 pages.

³⁰⁶ (Ibid.) Mukherjee V, Mustafa F. 2019. Climate change and right to development. *Management and Economics Research Journal*, Vol. 5, Article ID 735041, 10 pages.

³⁰⁷ Peremptory norms are norms which cannot be violated by any State "through international treaties or local or special customs or even general customary rules not endowed with the same normative force" as it has been affirmed in *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 *International Law Reports* 213 (2002)

³⁰⁸ United Nations Charter, Chapter 1: “Purposes and Principles”, Article 1(2); The right to self-determination of all peoples was confirmed by the United Nations General Assembly (GA) within its

according to which “all people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.³⁰⁹ Basically, “self-determination” relates to the right of people to choose their own political form of organization and relationship with other communities, but its extent goes beyond the political control, expanding to the cultural social and economic spheres. Both the ICESCR and the ICCPR provide for this right in connection to the right of all people to “for their own hands, freely dispose of their natural wealth and resources”³¹⁰ and insist on the fact that “in no case may a people be deprived of its own means of subsistence”.³¹¹ Thus, the Covenants underline that a necessary component of the right to self-determination is the right of people to permanent sovereignty over their natural resources; this gains a particular relevance taking into account the fact that this right has been first recognized and applied in the context of post - World-War II decolonization³¹² (and only in a second moment the application of this principle has been extended beyond the colonial context), where self-determination was first considered as a “principle concerned with the right to be a State”,³¹³ however, many international instruments (including the UN and the ICJ) have made clear that this principle does not deal exclusively with the “external” self-determination (as the one applying to the creation of a State or in case of secession after the process of decolonization) but it extends also to the “internal” self-determination.³¹⁴ meaning that people have the right, whether or not they constitute a State, to “freely dispose of their natural wealth and

Resolution 2625 (XXV): Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970.

³⁰⁹ ICESCR and ICCPR, Article 1(1).

³¹⁰ International Covenant on Civil and Political Rights art. 1(2), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1(2), Dec. 11, 1966, 993 U.N.T.S. 3.

³¹¹ (Ibid.) ICCPR, supra note 10, art. 1(2); ICESCR, supra note 10, art. 1(2).

³¹² “Decolonization is a process that usually requires, among other things, suitable access to natural resources in order to enhance institutions in a progressive manner and facilitate self-determination”: *Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu.

³¹³ James Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 130 (2019).

³¹⁴ *Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, published 24 Feb 2020, The Yale Law Journal. Available at [“https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination”](https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination)

resources”³¹⁵ and to “freely choose their own political system and pursue their own economic, social and cultural development”.³¹⁶ Moreover, the right to self-determination has been repeatedly applied by the International Court of Justice (ICJ)³¹⁷ which in certain passages of its Advisory Opinions has explicitly recognized it as a human right.³¹⁸ The ICJ has affirmed that respecting the right to self-determination of all people is an obligation *erga omnes*, which means that every member of the international community has a duty towards the rest of the international community to uphold this right and refrain from interfering with its exercise.³¹⁹ As a consequence, the principle of self-determination as such does not simply outline the existence of a duty for States to respect and protect the relative right (as it is provided under the ICESCR and ICCPR), but, by virtue of its *erga omnes* status, it poses the responsibility on States to ensure that the right to self-determination is realized. Indeed, this right establishes “a sort of heightened obligation *erga omnes* from which there cannot be any derogation”.³²⁰ Further, according to the ICJ, the right to self-determination under customary international law does not impose specific mechanisms for its implementation:³²¹ this evidences that this right is both expansive and flexible, and it gives space to the specific needs and circumstances of the communities which seek to exercise the right to self-determination and respect the obligations that weight upon the international community in order to support that exercise.³²² According to a study

³¹⁵ (Ibid.) ICCPR, supra note 10, art. 1(2); ICESCR, supra note 10, art. 1(2).

³¹⁶ (Ibid.) ICESCR and ICCPR, Article 1(1).

³¹⁷ The ICJ has applied and recognized the right to self-determination especially in the context of post-World-War II decolonization and adoption of the UN Charter.

³¹⁸ see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, para 52 (June 21); See Western Sahara, Advisory Opinion, 1975 I.C.J. 12, paragraphs 54-59 (Oct. 16); See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. General List no. 169, para 144 (Feb. 25).

³¹⁹ See, i.e. Case Concerning East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, para 29 (June 30); see also Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), Second Phase, 1970 I.C.J. 3, para 33 (Feb. 5).

³²⁰ “*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*”, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, published 24 Feb 2020, The Yale Law Journal. Available at [“https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination”](https://www.yalelawjournal.org/forum/climate-change-and-challenges-to-self-determination)

³²¹ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. General List no. 169, para 144 (Feb. 25).

³²² (Ibid.) “*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*”, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

conducted by the Special Rapporteur Mr. Hector Gros Espiell on the right of people to self-determination, the principle of self-determination constitutes a prerequisite and condition for the exercise and effective realization of human rights.³²³ the capacity of human beings to realize their human rights strictly depends on the degree at which their community exercises self-determination.³²⁴ This is due to the fact that self-determination “functions as a ‘standard of legitimacy’ and configurative principle or framework complemented by more specific human rights norms”,³²⁵ as it has been argued. Hence, the right to self-determination can be seen as a conglomerate right which, in order to be realized, requires the full enjoyment of many subsidiary human rights including the economic, social and cultural rights and in particular the rights to life, to an adequate standard of living, to adequate food, to water, housing and health.³²⁶ As a consequence, undermining one of these rights means undermining the right to self-determination in itself. As broadly discussed and observed in the previous paragraphs, at present, the anthropogenic climate change has had and continues to have deep negative impacts on the social, cultural and economic rights of all people globally; hence, if it’s true that undermining a subsidiary right means undermining the right to self-determination, it is possible to affirm that climate change indirectly constitutes a violation of the right to self-determination. In fact, by provoking the rise of global temperatures, of the sea-level, and by causing extreme weather-events, climate change threatens natural environments, endangering human life, destroying food and water systems, and in general “undermining the ability of people to enjoy suitable standards of living, including the enjoyment of cultural practices and natural-resource-based economic

³²³ Right of peoples to self-determination – Special Rapporteur Mr. Hector Gros Espiell Study, Implementation of United Nations Resolutions relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination. E/CN.4/Sub.2/405 (vol. I).

³²⁴ H.G. Espiell, ‘The Right to Self-Determination: Implementation of United Nations Resolutions’ (UN Doc. E/CN.4/Sub.2/405, 1980), at 591.

³²⁵ S.J. Anaya, ‘Self-Determination: A Foundational Principle’, in: S.J. Anaya (ed.), *Indigenous Peoples in International Law* (Oxford University Press, 1996), 75.

³²⁶ (Ibid.) “*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*”, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

sectors”.³²⁷ Moreover, considering that the right to self-determination implies the right of people to permanent sovereignty over their natural resources, in the context of climate change, where natural resources are continuously hazarded and threatened and the environment is less capable of producing them, another violation of the right to self-determination (in the form of the right to sovereignty over natural resources) can be identified. The “collective” right of self-determination has been considered in the context of climate change by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in its 2009 Report,³²⁸ in which it found that climate change is having particularly severe implications on the indigenous peoples’ right to self-determination, including their right not to be deprived of their own means of subsistence: in fact, the OHCHR recognized that indigenous people who occupy marginal lands and fragile ecosystems are at particular risk due to the potential for climate change to threaten their traditional livelihoods and cultural identity.³²⁹ As a consequence, the Report underlined the necessity of cooperation among States in order to face the threat that climate change poses to the right of peoples to self-determination.³³⁰ Moreover, it evidenced how human rights law at present does not provide clear solutions for those who are forced to leave the country due to climate change:³³¹ this gap could reveal the extent to which collective human rights, and self-determination in particular, “might contribute to an alternative logic in the international negotiations on emissions reductions”.³³² On the basis of all what observed, considering the linkage that can be identified between the right to self-determination and climate change, it is possible to affirm that

³²⁷ (Ibid.) “*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*”, Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

³²⁸ 2009 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61).

³²⁹ Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights (UN Doc. A/HRC/10/61, 15 January 2009), at paragraph 40.

³³⁰ (Ibid.) para 41.

³³¹ (Ibid.) para 60.

³³² “*A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change*”, Article by authors: Amy Maguire, Jeffrey McGee, published in *Review of European, Comparative & International Environmental Law*, April 2017, Available at: [“https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12193#reel12193-sec-0003-title”](https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12193#reel12193-sec-0003-title)

upholding the *jus cogens* norm of the right to self-determination of all people requires every State to take effective measures in order to address climate change and its related natural phenomena which are increasingly limiting the expression of this right,³³³ considering also the *erga omnes* rank of the obligations concerning its full realization. This is particularly relevant for States who have some degree of control over the well-being of peoples who live in non-self-governing communities, especially if these communities are threatened by climate change and its related natural phenomena.³³⁴

CHAPTER III

Human Rights Obligations relating to Climate Change

Part A Recognition of Human Rights obligations in the context of Climate Change

A.1 Attributability to States of Human Rights violations due to Climate Change: Human Rights violations in a strict legal sense?

At this point, it is concretely possible to affirm that there are clear linkages between human rights and climate change. It's less clear, however, which is the extent of these linkages, and which are the boundaries one should consider when dealing with these topics; in fact, if it's true, on one side, that since very few decades the UN human rights bodies and States have started to develop a

³³³ (Ibid.) "*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*", Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

³³⁴ (Ibid.) "*Climate Change and Challenges to Self-Determination: Case studies from French Polynesia and the Republic of Kiribati*", Essay by authors: Tekau Frere, Clement Yow Mulalap & Tearinaki Tanielu, 24 Feb 2020.

consensus on the understanding that climate change interferes with the enjoyment of human rights, it is also true on the other side that there is still little agreement on which is supposed to be the nature of the corresponding obligations burdening governments and private actors in order to address these climate change implications on human rights.³³⁵ In the second chapter, we have had the occasion to discuss about how the Male' Declaration had sparked the *impetus* in the UN human rights bodies to start to consider the linkage between human rights and climate change. This led to the submission in 2009, pursuant to the Human Rights Council Resolution 7/23 in which the Office of the UN High Commissioner for Human Rights was asked to conduct an analytical study over the possible linkages between human rights and climate change, of the Office of the UN High Commissioner for Human Rights' Report³³⁶ which seeks to underline the main aspects of the relationship between these two broad international law fields. The 2009 OHCHR Report is articulated in three Sections: taking into account the most recent reports of the Intergovernmental Panel on Climate Change IPCC on the matter, the first and the second Sections of the OHCHR Report are concentrated around the aim of finding linkages between human rights and climate change, providing also for an analysis of the main impacts of climate change upon human rights (as discussed in the 2nd Chapter of this paper), focusing on the single rights which are threatened by the extreme weather events connected to climate change; the third Section of the OHCHR Report, on the other side, is particularly relevant for the purpose of this Chapter, since it is aimed at outlining "how the empirical reality and projections of the adverse effects of climate change on the effective enjoyment of human rights relate to obligations assumed by States under the international human rights treaties".³³⁷ Within the last Section of the Report, in fact, there are two main questions that the OHCHR tries, through its analysis, to address: 1) does climate change violate human rights law in a strict legal sense? 2) Independently from weather climate change

³³⁵ United Nations Environmental Program (UNEP) Report "*Human Rights and Climate Change*" in cooperation with Columbia Law School, Sabin Center for Climate Change Law.

³³⁶ *Supra note* 103.

³³⁷ Report of the UN High Commissioner for Human Rights on the relationship between climate change and human rights, submitted in 2009 in occasion of the 10th session of the Human Rights Council. A/HRC/10/61, 15 January 2009.

constitutes a violation of human rights law, which are the national-level and international-level obligations that human rights law imposes to States with respect to climate change?³³⁸ Before looking at which answers did the OHCHR provide for these questions, it is relevant to remind that a violation of human rights occurs when and where there has been a breach of a duty under human rights law; however, not all the adverse effects on human rights imply such a breach, as, for instance, a mudslide caused by floods and heavy rains may surely interfere or threaten the right to life of those suffering for it, but it doesn't mean that a State caused it by acting in violation of his duties under human rights law. As anticipated in Chapter II,³³⁹ the OHCHR starts from the assumption that while it is obvious that climate change has several hazardous implications on the enjoyment of human rights, it is less obvious, however, whether these implications and effects could be considered as human rights violations in a strict legal sense.³⁴⁰ In fact, the OHCHR notes that there are at least three main difficulties which can be found when trying to consider climate change side effects as human rights violations. First of all, it could be impossible to untangle the “complex causal relationships”³⁴¹ existing between the historical GHG emissions of a given country and a specific climate change-related effect, not to mention the amount of direct and indirect implications such effect could have upon human rights.³⁴² Secondly, it can't be forgotten that global warming is always a contributing factor to many climate change-related extreme weather events, such as hurricanes, water stress, and the spreading of diseases, and it is impossible to understand whether a concrete extreme event is attributable specifically to global warming or to other causes (which is a factor to take into account when dealing with the allocation of responsibilities among States).³⁴³ Thirdly, “the adverse effects of global warming are always projections about

³³⁸ John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, Harvard Environmental Law Review 477 (2009).

³³⁹ See Chapter II, para. 2.1 Foreword.

³⁴⁰ (Ibid.) Report of the UN High Commissioner for Human Rights on the relationship between climate change and human rights.

³⁴¹ (Ibid.) Report of the UN High Commissioner for Human Rights on the relationship between climate change and human rights.

³⁴² (Ibid.)

³⁴³ (Ibid.)

future impacts”,³⁴⁴ while normally a violation of human rights can be established after the harm has occurred.³⁴⁵ Despite the OHCHR does not provide for the clearest analysis in this regard, in the three abovementioned difficulties to individuate a human rights violation in the climate change-related events, it is possible to recognize that the main concerns of the OHCHR lie within the concrete difficulty to conclude that a particular effect on human rights results from global warming rather than from other possible causes (especially if this estimate is conducted before the effect has occurred), and within the difficulty of allocating responsibilities for contributions to the global warming among two hundred States.³⁴⁶ Hence, it is because of these reasons that in the Report the OHCHR finds out that the physical impacts of global warming in themselves “cannot easily be classified as human rights violations”,³⁴⁷ including due to the fact that climate change-related effects cannot be clearly attributed to acts or omissions conducted by specific States. In the report’s conclusion that climate change does not in itself constitute a violation of human rights, it is evident the intention of the OHCHR to avoid the technical and political implications that an opposite conclusion - namely that countries violate human rights law through the mere emission of greenhouse gases - would have acquired, especially in the absence of a specific legal instrument which could better allocate the many States and private actors’ responsibilities in this sense.³⁴⁸ Anyway, despite this conclusion, the Report explains yet that whether or not climate change constitutes a violation of human right law, “human rights obligations provide important protection to the individuals whose rights are affected by climate change”,³⁴⁹ which means basically that climate change does not need to violate human rights in order for States to have legal obligations under human rights law related to it:

³⁴⁴ (Ibid.)

³⁴⁵ For instance, in the case *Aalbersberg v. The Netherlands*, (No. 1440/2005), the Human Rights Committee has clarified that in order for a person to claim to be a victim of a given human right violation, the person in question must show that an action or omission of a State Party has already affected his/her enjoyment of that given right, or that in any case such effect is quite imminent.

³⁴⁶ (Ibid.) John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

³⁴⁷ (Ibid.) Report of the UN High Commissioner for Human Rights on the relationship between climate change and human rights. Conclusions para 96.

³⁴⁸ (Ibid.) John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

³⁴⁹ OHCHR 2009 Report, para 71.

there are in any case duties placed on States by human rights law which are relevant in the context of climate change. These findings may at the first sight seem confusing, since one may think “how can States have legal duties to address a problem for which they are not legally responsible?”³⁵⁰ the answer could be observed looking at the previous example: a mudslide which is caused by floods and heavy rains (and thus not directly by a State) may not present the legal basis for being considered as a violation of human rights law, yet human rights law may still require a State to take steps in order to protect the people who may suffer for it.³⁵¹ In this regard the OHCHR emphasizes that a negative effect over human rights does not necessarily need to have already occurred -which is, as previously said, the normal hypothesis- but the effect, especially in the context of climate change, may actually be just “imminent”.³⁵² In conclusion, it is therefore possible to affirm that in any case States have duties to protect citizens from threats to their human rights even when they are not the direct responsible for those threats. In this context it could be relevant to frame an important case which has been considered as a landmark decision in the international panorama, for it concerns a ruling which, for the first time in the history of climate change relates cases, concludes that a State has legal duties to take positive actions in order to protect human rights from the negative effects of climate change: the case in question is *the Urgenda Climate Case*.

a) *The Urgenda Climate Case*

The *Urgenda Foundation v. State of the Netherlands* (known as the *Urgenda Climate Case*) is a recent court case (2019) which regards the government of the Netherlands’ obligations to cut its carbon dioxide emissions in order to protect the human rights of the Dutch citizens. A central question of the case was whether

³⁵⁰ (Ibid.) John H. Knox.

³⁵¹ See *Budayeva and others v Russia* (European Court of Human Rights, Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008)

³⁵² (Ibid.) OHCHR 2009 Report citing. *Aalbersberg v. The Netherlands*.

the State had the right to impose further reductions on GHG emissions above the limits already established in Dutch climate policy.³⁵³ Following the Fourth and Fifth Assessment Reports of the Intergovernmental Panel on Climate Change (IPCC), which emphasized the necessity of a reduction of carbon dioxide emissions by 2030, the European Union established a reduction goal for all the Member States in order to lower their carbon dioxide emissions of 50% by 2030: a measure that was also in compliance with the 2016 Paris Agreement which required similar goals to be reached worldwide and which requested each Member State, including the Netherlands, to establish their own national policy measures in compliance with the Paris Agreement's goal. Despite the Netherlands has always been considered as a leading country in terms of taking actions in order to face climate change, starting from 2010, some activists, including the Urgenda Foundation (a climate activist group representing the interests of 886 Dutch citizens) started to claim that the government was beginning to favor more the traditional fossil fuels industries rather than the renewable ones, assuming an opposite behavior to the one required by its commitments to reducing carbon dioxide emissions under the national and the EU law. In 2013, Urgenda sued the State of the Netherlands, arguing that it was committed to take positive measures in order to reduce its carbon dioxide emissions of 40% by 2030, or at least of 25% by 2020, (which is the minimum that IPCC and its reports estimated as possible for the developed countries to reduce and that was necessary to prevent the negative consequences of climate change), and claiming that a lower target violated many human rights provisions under the Dutch Constitution, the European Convention on Human Rights (ECHR), and the government's duty of care³⁵⁴ under the Dutch Civil Code.³⁵⁵ At first, the case was brought before the District Court of the Netherlands, which ruled in favor of Urgenda, finding that in fact, before 2010, the State had planned to reduce its emissions to the 30% by 2020, but then, since 2010 it changed the

³⁵³ Environmental Law Alliance, *Urgenda Foundation v. The State of Netherlands*.

³⁵⁴ Article 6:27 of the Dutch Civil Code recognizes a General duty of care, according to which "A person who has to deliver (supply) an individually specified thing is obliged, up until its delivery, to look after it in the way as a prudent debtor would in the given circumstances." In this case there has been an extensive interpretation of this rule which generally regards the "Performance of an obligation".

³⁵⁵ *Urgenda* District Court Opinion, para 4.86.

national policy and reduced the goal to the 14-17%, a percentage which, among the other national and Eu law violations, is clearly insufficient for meeting the State's fair contribution toward the UN Paris Agreement goal of keeping global temperature increases within 2 C° of pre-industrial conditions. Moreover, despite the State argued that on average the Netherlands' contribution of carbon dioxide emissions is not as significant as the one of the other States, the Court observed that "the State should not hide behind the argument that the solution to the global climate problem does not depend solely on Dutch efforts";³⁵⁶ in fact, any States' individual reduction can positively contribute to the prevention of the dangerous climate change effects, and, being a developed country, the Netherlands together with other developed countries should take the lead in this.³⁵⁷ In conclusion, the Court affirmed that Urgenda's arguments of the State's alleged violations of both the ECHR and the Dutch Constitution were unfounded,³⁵⁸ but that, on the other side, by setting the reduction target to the 17% rather than on the minimum of 25%, the Government had breached its duty of care under the Dutch Civil Code which requires parties to take precautionary measures in order to mitigate hazardous situations; as a consequence, the Court found that the government of the Netherlands was legally bound to reduce emissions in order to protect human life and set the 25% minimum limit to the State's emissions. It is relevant to notice that, despite the Court concluded that the violation was solely related to the government's duty of care under the Dutch Civil Code, nonetheless it considered the UN and the EU climate agreements (as well as other international law principles and climate science) to define the extent of the duty of care with respect to climate change; in fact, the Court declared that international obligations and principles have a "reflex effect" in national legislation³⁵⁹ and thus, the national Courts can take under consideration the many international law obligations and principles when they interpret national law standards.³⁶⁰ The

³⁵⁶ Neslen, Arthur (24 June 2015). "Dutch government ordered to cut carbon emissions in landmark ruling". *The Guardian*. Archived from the original on 23 December 2019. Retrieved 21 December 2019.

³⁵⁷ (Ibid.)

³⁵⁸ The District Court rejected the ECHR alleged violations on the basis of Article 34 of the Convention, according to which the ECHR cannot be invoked for "public-interest" actions, but only individual claimants whose interests have been affected can invoke it.

³⁵⁹ *Urgenda* District Court Opinion, para 4.52.

³⁶⁰ (Ibid.) *Urgenda* District Court Opinion, para 4.43.

District Court's decision was then appealed by the State before the Court of Appeal: The State argued that the District Court's exceeded the traditional *trias politica*, - the Dutch separation of powers -, since it was creating an environmental policy through its rulings, while, as claimed by the State, policy decisions regarding the financial and economic sacrifices required to reduce GHG emissions should be left to the democratically elected government alone³⁶¹ Urgenda, on the other side, started to strengthen the human rights alleged violations under the ECHR (rejected in 1st instance), asserting that the Dutch Government was obliged to reduce its emissions under national and EU human rights law and in particular under Article 2, (which protects the right to life), and Article 8, (which protects the right to private and family life) of the European Convention on Human Rights (ECHR). The Court of Appeal rejected the government's argument that the lower Court's decision constituted an order to create an environmental policy and that it violated the *trias politica*, emphasizing that in any case the government has complete discretion for what concerns the methods of compliance and contents of any legislation;³⁶² instead, contrarily to the lower Court's opinion, in 2nd instance the Court of Appeal found that the right to life under Article 2 and the right to private and family life under Article 8 (used by Urgenda as a basis for the alleged violations of the government's duty of care), actually placed a positive duty of care on the government to protect its citizens from every environmental situation that could have affected those rights.³⁶³ according to the Court of Appeal, in fact, the Dutch government has an obligation under the ECHR to protect these rights from the threats connected to climate change. As a consequence, "because climate change poses a known, real and imminent threat of loss of life and disruption of family life to Dutch citizens",³⁶⁴ and because, according to the IPCC, at least the 25-40% reduction

³⁶¹ *Urgenda* Court of Appeal Opinion, para 67.

³⁶² Harvard Law Review, "State of the Netherlands v. Urgenda Foundation", Hague Court of Appeal requires Dutch Government to Meet Greenhouse Gas Emissions Reductions by 2020", May 10, 2019.

³⁶³ In fact, the Court of Appeal declared that Article 34 of the European Convention does not govern access to Dutch Courts and that Dutch law allows class actions by groups in domestic courts. For that reason, the District Court should have permitted Urgenda to directly invoke the European Convention on Human Rights on behalf of its members.

³⁶⁴ Harvard Law Review, "State of the Netherlands v. Urgenda Foundation", Hague Court of Appeal requires Dutch Government to Meet Greenhouse Gas Emissions Reductions by 2020", May 10, 2019.

of carbon dioxide emissions by 2020 is required to prevent negative effects of climate change, the Court of Appeal agreed with the lower Court on the necessity to set the reduction target of at least the 25% by the end of 2020 in order to satisfy the government's duty of care; once again, by not wanting to reduce its emissions to at least the 25% by 2020, the State of the Netherlands had failed to fulfil its duty of care (under both national and EU law). The Court of Appeal's decision was then confirmed by the Supreme Court of the Netherlands, which, appealed by the State, rejected its appeal and confirmed the previous Court's judgements upholding the 25% reduction requirement. The Supreme Court reiterated the Court of Appeal's argumentation that "every country is responsible for its share of emissions"³⁶⁵ observing as well that insufficient action to address climate change poses, on one side, risks of irreversible changes of the many ecosystems of the world thus affecting the livability of the planet in itself, and on the other side, risks that the current and future generations of citizens will be suffering loss of life and/or disruption of private and family life that the State has a duty to protect.³⁶⁶ This case has been considered revolutionary especially in the light of a new upcoming field of *climate justice*³⁶⁷ as well as in the vision of a consuetudinary or jurisprudential affirmation of a new set of rules on the merit. As new cases such as Urgenda start to appear little by little in this context,³⁶⁸ the concept of *climate justice* becomes day by day more relevant, since a new case law on the matter of climate change could perhaps help establishing new theories and rules with the regard of the behavior of States in protecting human rights. The importance of this case has been recognized by the UN High Commissioner for Human Rights which applauded the Netherlands' Courts landmark decisions according to which the State is required to take more positive and ambitious climate action in order to protect human rights from the negative effects of

³⁶⁵ Schwartz John (20 December 2019). "In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action". *The New York Times*. Archived from the original on 21 December 2019. Retrieved 21 December 2019.

³⁶⁶ *Urgenda* Supreme Court Opinion.

³⁶⁷ Climate Justice means to frame climate change and global warming as ethical and political issues rather than purely environmental. This objective is reached by relating the causes and effects of climate change to concepts of justice, and in particular environmental justice and social justice. Climate justice analyses concepts such as human rights, collective rights, and the historical responsibilities for climate change.

³⁶⁸ See i.e. Leghari v. Pakistan and Juliana v US.

climate change.³⁶⁹ In particular, the High Commissioner agreed with the Court’s opinion that human rights obligations are vital for providing an effective response to climate change and she affirmed that “more ambitious climate action, in all parts of the world, is a human rights obligation rather than simply a policy choice.”³⁷⁰ In conclusion, this decision confirms the idea expressed in the previous paragraph (and supported by the OHCHR 2009 Report) that, irrespective of whether climate change effects can be considered as direct violations of human rights or not, in any case States have “binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases”,³⁷¹ in order to provide protection to the individuals whose rights are affected or threatened by climate change.

A.2 Difficulties to Hold a State Accountable: the problem of allocating responsibilities

In the previous paragraphs, we have observed that there are three main obstacles one may encounter when trying to consider climate change effects as human rights violations: 1) impossibility to individuate the causal relationship which exists among the GHG emissions of a specific country and a particular effect on human rights; 2) impossibility to establish when a particular effect on human rights was caused by global warming; 3) global warming’s effects are always projections about future impacts, while human rights violations are detected normally after the harm has occurred. As previously discussed, these three main obstacles reflect the principal concern of the OHCHR in affirming that climate change constitute a violation of human rights in a strict legal sense: it is concretely difficult to allocate responsibilities for contributions to global

³⁶⁹ United Nations Human Rights Office of the High Commissioner website, “Bachelet welcomes top court’s landmark decision to protect human rights from climate change”, Geneva, 20 December 2019.

³⁷⁰ UN High Commissioner for Human Rights Michelle Bachelet on Friday 20 December 2019

³⁷¹ (Ibid.) United Nations Human Rights Office of the High Commissioner website, “Bachelet welcomes top court’s landmark decision to protect human rights from climate change”, Geneva, 20 December 2019

warming among two hundred States. Assigning responsibilities to each single State for climate change is a real problem, but not for a mere question of causation of the negative effects on human rights; in fact, there is no doubt in the scientific community that for instance the negative effects of climate change are already foreseeable in many vulnerable Regions of the planet, such as the Arctic, where the IPCC confirmed with “very high confidence...that there is already strong evidence on the ongoing impacts of climate change on communities”.³⁷² It is not necessary to link the emissions of a specific State to a particular harm in order to assign responsibility for that harm; for example, knowing that each single emission of GHG contributes to increase the global warming (and thus to encourage climate change), responsibility could be allocated according to each State’s shares of global emissions of GHG’s.³⁷³ This idea for allocating responsibilities seems to work especially if one considers that there are countries who are globally known to contribute the less to climate change with a reduced amount of GHG emissions, and countries which are famous for being the major emitters and for having contributed the most to climate change. For instance, only the United States and China together are responsible for more than one-third of current emissions, while, these two together with the European Union, are responsible for more than half of them. On this basis, it would be possible, at least theoretically, to conclude that even if all States contribute to climate change and are therefore jointly responsible for the negative impacts on human rights - albeit not directly for a violation of human rights in the strict legal sense - some States are far more culpable than others, and then responsibilities could be allocated accordingly.³⁷⁴ But the real problem in operating an allocation of responsibilities depends on whether or not taking into account the past emissions of each State, which would significantly increase their the level of responsibility,

³⁷² OHCHR 2009 Report, at 655.

³⁷³ John H. Knox, Linking Human Rights and Climate Change and the United Nations, vol. 33, Harvard Environmental Law Review 477 (2009).

³⁷⁴ This argument has been supported by the International Council for Human Rights Policy (ICHRP), which has observed that “specific actors *are* responsible for climate change - namely, those who overuse carbon fuels, albeit in highly varying degreesThe question is whether this group can be broken into definite and identifiable parties to whom responsibility can be attributed in a specific and discrete manner.” International Council on Human Rights Policy, Climate Change and Human Rights: a rough guide 65 (2008)

and most importantly on whether or not taking into account each State varying per capita emissions.³⁷⁵ For instance, it may seem unfair to consider China as responsible as the United States for the effects of climate change on the basis of their current total emissions, since China's per capita's emissions are far less. Beside this problem of "fairness", another relevant obstacle to the allocation of responsibilities would be purely political. In fact, the major emitters of GHG are - not casually - the most powerful States in the world; then, it would be problematic to accuse them to violate their human rights obligations in respect to climate change as this would result as an element of distraction from their need to win the consent to an effective climate agreement, as well as their need to give credibility to their oppositions to further eventual international debates on the effects of climate change on human rights: it does not surprise that while the majority of States reacted to the OHCHR's Report's argumentations agreeing on the point that climate change threaten the enjoyment of human rights, they never supported the idea that climate change constitutes in itself a violation of human rights law. For instance, in its Submission to the OHCHR, the United States even argued that "moving towards a human-rights based approach would have resulted impractical and unwise"³⁷⁶ on the basis that, in its understanding, human rights are primarily conceived as requiring governments to provide remedies for victims of human rights violations occurred within their jurisdiction, while, considering human rights in the light of climate change (namely a rights-based approach to climate change), due to the complex long-term nature of climate change, it would result problematic "to identify a particular party as being uniquely responsible for any particular impairment of the enjoyment of human rights caused by climate change".³⁷⁷ Other States didn't support the US' position even though they refused to recognize that climate change constitutes in itself a violation of human rights. In conclusion, the many difficulties one may encounter when holding a State accountable for the negative effects of climate change upon human rights suggest that, at least by now, it's enough to consider that in any case, as observed in the

³⁷⁵ (Ibid.) John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

³⁷⁶ Submission of the United States to the OHCHR under Human Rights Council Resolution 7/23, at 4 (2008)

³⁷⁷ (Ibid.) Submission of the United States to the OHCHR.

previous paragraph, States have duties to address the negative effects of climate change on human rights independently from whether the State has contributed to climate change in a way which gives rise to specific human rights violations,³⁷⁸ and thus to the need of allocating responsibilities. Maybe in the future, “as scientific knowledge improves and the effects of climate change become larger and more immediate”,³⁷⁹ tracing the causal connections between particular contributions to global warming/climate change and the resulting harms on human rights will become easier; but for now, determining whether climate change violates human rights or not (a question from which the problem of allocating responsibilities strictly depends, as observed at the beginning of the paragraph) is not a relevant question. In fact, as the OHCHR observes in its 2009 Report, even in the absence of such a finding “human rights obligations provide important protection to the individuals whose rights are affected by climate change”.³⁸⁰

A.3 States Duties to Respect, to Protect and to Fulfill Human Rights with respect to Climate Change

As observed in Chapter II, climate change threatens a wide range of human rights, starting from the right to life to the right to development and self-determination. Within this regard, it has been observed that in order to provide for a protection against the negative consequences on human rights deriving from environmental harm and degradation, human rights law had to evolve in the sense of considering the application of human rights obligations also in cases in which such

³⁷⁸ OHCHR 2009 Report, para. 71.

³⁷⁹ UNEP Report, pag 13, footnote 70. “It bears noting that these issues are becoming less problematic over time”. For instance, “recent research on current and historical GHG emissions has made it easier to allocate responsibility for emissions among different States”. See i.e. World Resources Institute, CAIT Climate Data Explorer (2015). Available at <http://cait.wri.org>.

³⁸⁰ (Ibid.) OHCHR 2009 Report, para 71.

environmental harm may have occurred.³⁸¹ In this context, however, trying to adapt human rights duties to the problem of climate change is not an easy challenge due to some practical incompatibilities between the two: first of all, the cumulative effect of GHG emissions, according to which, as previously discussed, each State's action contribute to increasing global warming and thus global climate change, makes it practically impossible to properly allocate responsibilities among States for the correspondent human rights implications worldwide. This is also due to the fact that human rights law does not require States to respond for human rights harms wherever they occur, but instead human rights obligations are typically referred to corresponding right holders within the territory of a State, and in particular citizens and private actors within the State's jurisdiction: this approach is clearly inadequate to deal with the context of climate change implications on human rights, which by nature is not limited by territorial or jurisdictional boundaries.³⁸² Another problem regards the fact that a significant portion of these GHG emissions does not directly come from States, but from private actors operating within their jurisdiction, such as private corporations: these non-State-actors generally are not parties to international human rights treaties and therefore are not directly but only incidentally bound by human rights law, in the measure in which States may have obligations under human rights law to regulate private actors' emissions within their territories. Because of these reasons, in the previous paragraphs we have observed that in the light of the OHCHR's Report, it is complicated to affirm that the negative effects and impacts of climate change upon human rights constitute human rights violations in a strict legal sense, in particular for what concerns the allocation of responsibilities when it comes to GHG emissions. Anyway, as previously observed, behind the OHCHR's conclusions that climate change doesn't in itself constitute a violation of human rights, there are as well political issues. Instead, for the purpose of understanding in the next Chapter which are the benefits

³⁸¹ For instance, in many General Comments the Human Rights Committee and the Committee on Civil and Political Rights have stressed the necessity to consider environmental degradation negative consequences on the enjoyment of many human rights, such as the right to food, to water, housing etc.

³⁸² Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change. In: Environmental Human Rights and Climate Change. Springer, Singapore. https://doi.org/10.1007/978-981-13-1960-0_8

coming from the adoption of a rights-based approach to climate change, we will try to put apart for a moment the problem of addressing a human rights violation, which depends on the difficulties of allocating responsibilities, and focus on which would be the benefits of the application in the climate change context of the typical three-level duties owned by States under international human rights law: the duties to respect, to protect and to fulfill human rights.³⁸³ For now it would be enough to keep in mind that adopting a rights-based approach to climate change could provide for a more concrete framework of obligations applicable to States and concerning the protection of human rights against climate change negative impacts: this is because the human rights framework requires, in order to find that a human right violation has occurred, to always identify a right-holder and a corresponding duty-bearer, and therefore to recognize which is the content of the obligations owned by the duty bearer to the right-holder: a precision which, overpassing the problem of responsibility previously addressed, would be concretely useful in the context of climate change in order to individuate a system of applicable obligations for protecting human rights in the concrete case. For what concerns the three human rights typical duties, in particular, it's necessary to remind that the duty to respect refers to the fact that States should refrain from taking positive actions which may interfere with the enjoyment of human rights, and for this reason is considered as a negative duty. The duty to protect human rights requires States to take effective measures in order to prevent interferences with the enjoyment of human rights by the State in itself and by non-State actors as well. The duty to fulfill is considered as a positive obligation as it requires States to take steps towards the possibility for all person to enjoy human rights. The application of these duties with regard to the environmental harm and degradation is already well established when such environmental harm occurs within a State's territory and jurisdiction, and numerous examples are provided in the jurisprudence of the European Court of Human Rights.³⁸⁴ In particular, nevertheless, in the same jurisprudence a general understanding has been formed

³⁸³ Steiner H. et al (2007) *International human rights in context*, 3rd edition. Oxford University Press, Oxford (185-189).

³⁸⁴ (Ibid.) Lewis B. (2018) *Challenges Confronting a Human Rights-Based Approach to Climate Change*.

according to which States should refrain from taking actions and omissions which may be able to cause harm in other States,³⁸⁵ and at the same time it has been affirmed the idea that the “jurisdiction” of a State includes the exercise of a State’s human rights duties which occur outside its territory or produces effects outside its territory, where the State exercises anyway an effective control.³⁸⁶ On these basis, then, there may be space for broadening the content of these State’s human rights duties in order to make them applicable to the widest field of climate change, which is, by nature, a transboundary issue. An analysis of how these three traditional levels of duties could be applied with regard to climate change (in order to individuate a framework of human rights obligations that could be adopted with respect to climate change) will now be provided. First of all, for what regards the duty to respect human rights, considering that climate change negatively affects a wide range of human rights, the result of the application of the duty to respect human rights to it would be the imposition on governments of an obligation to refrain from acting in a certain way which could contribute to the progression of climate change, and, at least theoretically, if it is given that climate change threatens the rights of all people, then the obligation to respect these human rights against climate change should apply to all States. For what concerns the specific actions that States would be required to take under the duty to respect as applied to climate change, States should prevent or at least reduce GHG emissions.³⁸⁷ This duty is basically related to a State’s own actions and own activities, but it should be seen also as extending to any exercise of the government’s authority which would cause interferences with the enjoyment of human rights: for instance, a government’s decision to approve the construction of a privately owned coal mine or a government’s behavior which facilitates the fruition of a dangerous project, i.e. through subsidies and other incentives, would constitute the violation of the duty to respect human rights, since these actions could be considered as demonstrating the will of a State to facilitate emitting

³⁸⁵ See cases: *Trail Smelter* 1949; *Corfu Channel* 1949; *Pulp Mills* 2010.

³⁸⁶ See i.e. cases: *Loizidou v. Turkey*; *Manitaras and Others v. Turkey*; *Chiragov and Others v. Armenia*.

³⁸⁷ Quirico O et al (2016) “States, climate change and tripartite human rights: the missing link”. In: Quirico O, Boumghar M (eds) *Climate change and human rights: an international perspective*. Routledge, Abingdon, p 7.

activities.³⁸⁸ Another specific action which States would be required to take under the duty to respect, is to foster an energy sources-policy accompanied by regulations on how to minimize GHG emissions and which is in compliance with a State's obligations under the international climate regime.³⁸⁹ This would include as well a duty not to distort, fake or avoid scientific information on the matter of climate change.³⁹⁰ These duties are necessary in order to make sure that a State does not infringe his duty to respect human rights through refraining from taking actions which could affect the enjoyment of such rights.³⁹¹ Nevertheless, the duty to prevent or reduce GHG emissions should be in any case balanced with other States' obligations; for instance States could argue that a certain level of emissions is in any case necessary for the fulfillment of other human rights, such as economic, social and cultural rights. As a consequence, the duty to respect human rights may not necessarily be translated in an obligation to reduce GHG emissions. Moreover, another relevant issue within this context regards the fact that, at least under the traditional human rights principles, States' obligations are owned with regard to the rights of a limited number of persons (citizens, private actors): as stated in the previous paragraphs, this would create problems with respect to climate change as a phenomenon which affects with more severity the developing countries (who contribute the less to the emission of GHG), since the States which are major emitters would be required to pay attention only to the rights of those persons within their own territories and jurisdiction (who are most of the times the less affected by the negative impacts of climate change). This leads to the need to find obligations at a higher, international level which would allow to move beyond the territorial and traditional conception of human rights obligations; this problematic will be further assessed. In conclusion, knowing that a violation of human rights occurs only when there has been a breach of a duty

³⁸⁸ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

³⁸⁹ Bodansky D (2010) Climate change and human rights: unpacking the issues. *Ga J Int Comp Law* 38:511

³⁹⁰ Sheila Watt-Cloutier, Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 7 December 2005. <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>; Quirico et al. 2016: 9.

³⁹¹ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

under human rights law, translating in a concrete context all the observed obligations which could be applied to States under the duty to respect human rights would require proofing that by acting in a specific way (i.e. continuing to emit GHG at an unsustainable level) a State has violated a specific human rights, thus violating his duty to respect human rights which required such a State to act differently. In this case, it's true that the cumulative effect of GHG emissions, as it makes it complicated to isolate the single emissions coming from a single State, would result in States denying their responsibilities by arguing that their emissions does not make any difference in the global warming, but it's also true that scientific techniques are being improved in a way which is becoming easier to detect the respective contributions of a specific State and to understand the aggregate effect of global GHG emissions.³⁹² The duty to respect can thus stay "intact" requiring all States to play their part in addressing the negative effects of climate change on human rights.³⁹³ For what regards the duty to protect, the application of this duty to the context of climate change would provide for an obligation of States to protect their citizens and private actors within their jurisdiction from the harmful effects of climate change: this basically means that States should adopt effective adaptation measures within their territories.³⁹⁴ Moreover, from this obligation would derive the duty for States not to allow private actors within their jurisdiction to carry out activities which would cause human rights violations, and to eventually provide for remedies and compensation in case such violations occur.³⁹⁵ The content of the other obligations which would apply to States under the duty to protect in the context of climate change, could be derived from the European Court of Human Rights' Jurisprudence regarding the environmental-based violations of human rights, according to which States should adopt regulatory frameworks in order to make

³⁹² (Ibid.) John H. Knox, Linking Human Rights and Climate Change and the United Nations, vol. 33, Harvard Environmental Law Review 477 (2009).

³⁹³ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

³⁹⁴ Knox J (2009–2010) Climate change and human rights law. Va J Int Law 50:163

³⁹⁵ Knox 2016: 16–17; Quirico et al. 2016: 13; McCorquodale R (2009) Corporate social responsibility and international human rights law. J Bus Ethics 87:385.

sure that non-State actors refrain from causing human rights violations.³⁹⁶ This approach has been used to find violations of human rights especially in cases of States' failures to control the private actors' activities which were able to threaten the environment in a way to indirectly pose threats also on human rights.³⁹⁷ Following this logic, then, States would be required as well to regulate the activities of the private actors involved in the adoption by a State of mitigation and adaptation measures, in order to avoid incidental human rights violations.³⁹⁸ An important contribution deriving from the European Court of Human Rights' Jurisprudence (and confirmed by the OHCHR's 2009 Report) is that it separates the duty to protect human rights from the actual causing the harm to such human rights. For instance, in the case *Budayeva v. Russia*, the State of Russia was held responsible of not having taken actions in order to provide its citizens for mud-protection against the adverse effects of a mudslide, even though the mud in itself had not been caused by the State.³⁹⁹ This is basically what the OHCHR's was meaning in its Report while affirming that despite the difficulties in individuating human rights violations in climate change, "human rights obligations provide important protection to the individuals whose rights are affected by climate change".⁴⁰⁰ Therefore, the fact that a State did not cause the threat does not justify the fact that it has failed to provide for protection against it;⁴⁰¹ this leads to the idea that under the duty to protect an obligation exist within the context of climate change to undertake adaptation measures to provide for protection against the "unavoidable effects of climate change",⁴⁰² which is an obligation

³⁹⁶ Pedersen O (2010) Climate change and human rights: amicable or arrested development? *J Hum Rights Environ* 1(2):236; Knox 2009, 2010: 191

³⁹⁷ In this regard, several cases brought before the European Court of Human Rights have successfully argued that environmental interference ranks to a violation of the rights protected in the European Convention. See i.e. *Fadeyeva v Russia* (2005) and *Lopez Ostra v Spain* (1994), where the State failed to meet domestic standards by allowing excessive levels of pollution; *Taskin v Turkey* (2004) and *Giacomelli v Italy* (2006), where the State failed to implement a domestic court's decision to close a facility.

³⁹⁸ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

³⁹⁹ See case *Budayeva and others v. Russia*, European Court of Human Rights, Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008

⁴⁰⁰ OHCHR 2009 Report, para 71.

⁴⁰¹ (Ibid.) John H. Knox, Linking Human Rights and Climate Change and the United Nations, vol. 33, *Harvard Environmental Law Review* 477 (2009).

⁴⁰² (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

independent from a State's individual contribution to climate change, and would apply even if the cause which interferes with the enjoyment human rights is beyond the control of a State. Relying on these premises, then, according to the Special Rapporteur on human rights and the environment, John Knox, this duty may require another States obligation within the context of the right to protect, which consists in the fact that States should do everything which is in their power in order to reduce GHG emissions, (so as to reduce the probability of these 'unavoidable effects of climate change' to occur) thus making it necessary to try to negotiate a response at the international level based on the commitment for each State to regulate its own emissions in order to take collective action for limiting climate change.⁴⁰³ Finally, for what regards the duty to fulfill, this probably represents the most important standard with regard to human rights law as applied to the climate change context, as it requires States to adopt effective measures against climate change in order to make sure that the enjoyment of human rights is guaranteed to all people (at least the ones within their jurisdiction): this could be done by undertaking adaptation measures which could make sure that people continue to enjoy their rights in the face of climate change⁴⁰⁴. Parallely, however, this duty represents the most difficult duty to be applied within the context of climate change. Reading it in the context of climate change, this duty may require States to support mitigation actions, as these would help lowering the GHG emissions levels, which is a key requirement for the purpose of ensuring that human rights can be enjoyed by all people in the future: this measure is referred to as 'complementary mitigation', and represents the promotion and facilitation of human rights in the making-process of more proactive and human rights-oriented climate policies.⁴⁰⁵ It is relevant to notice that the ICESCR considers the obligation to fulfil human rights as requiring States to work towards the progressive realization of economic, social and cultural rights, and in order to achieve this goal refers to the importance of

⁴⁰³ Bodansky 2010: 520; Cameron E (2010) "*Human rights and climate change: moving from an intrinsic to an instrumental approach.*" Ga J Int Comp Law 38(3):673

⁴⁰⁴ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁴⁰⁵ Quirico et al. 2016: 16

international cooperation.⁴⁰⁶ In this regard, a number of scholars⁴⁰⁷ have referred to the importance of a duty to cooperate at the international level in order to address the climate change-related impacts on human rights, as it is requested also by the same nature of climate change as being “a global problem which requires global solutions”;⁴⁰⁸ according to this duty, States would be required to work together towards the realization of lower GHG emissions standards, and wealthier States would be required to help poorer States: the latter represents an obligation which is also provided under the UNFCCC and the Paris Agreement,⁴⁰⁹ which consists in particular in the fact that developed States must assist poorer States in taking adaptation and mitigation measures to climate change. However, such obligations are not comprehended under human rights law and are only limited within the context of climate change as provided under the UNFCCC and the other climate agreements. Anyway, the question whether the extent of human rights duties could be extended also beyond the territorial and jurisdictional contexts of a State is still extremely relevant in order to properly assess the adoption of a human rights-based approach to climate change, and will be observed more in detail in the further paragraphs.

Part B Human Rights Obligations relating to Climate Change at the International level

B.1 The Challenge of Extraterritoriality and the Importance of International Cooperation

In the previous paragraphs, it has been argued that the question whether a State *causes* climate change, is a different question from whether it has in any case

⁴⁰⁶ ICESCR, Article 2, 1966.

⁴⁰⁷ Cameron 2010: 699; Knox 2016

⁴⁰⁸ Human Rights Council, Resolution 7/23 “Human Rights and Climate Change” A/HRC/RES/7/23, 28 March 2008.

⁴⁰⁹ UNFCCC 1992: Article 4; Paris Agreement 2015: Articles 7 and 9

duties to address the negative effects of human rights.⁴¹⁰ Within this regard, we have observed how States should have more concrete human rights obligations with respect to climate change and therefore we have tried to shape a human rights obligations framework which could be applied to the context of climate change through the adoption of a rights-based approach based on the application to climate change of the traditional three main duties (to respect, to protect and to fulfill) normally applicable to States under human rights law. This last analysis has led us to the necessity to focus on extraterritoriality and to the second main problem existing with respect to the application of human rights obligations in the climate change context. In particular, this problem concerns the fact that while the causes and effects of climate change are generally conceived as occurring at the international level, beyond any jurisdictional or territorial context, human rights obligations are normally attributable to States only within their territorial borders or jurisdictional contexts, including, according to the definition of jurisdiction, those territories where a State anyway exercises an effective control.⁴¹¹ For what concerns climate change, as previously argued, the necessity to address it at the international level comes basically from the conception of climate change as an issue which is predominantly transboundary: this becomes clearer if one considers that GHG emissions are by nature transboundary issues, since, although released by each single State in a higher or lower percentage, they still produce their effects on a global scale with negative consequences which can potentially harm people all around the world. In this regard, it is relevant to notice that under international law in general, before holding a State responsible for the consequences of its actions and omissions, it must be ensured that those consequences result from the exercise of a State's jurisdiction or control:⁴¹² while this assessment can be easily made with regard to, for instance, the transboundary pollution of a river, it is way more difficult to make such an assessment when it comes to the emissions of GHG, and this is due to the fact that the consequences in such case are only observable in terms of a cumulative effect of the exercise

⁴¹⁰ John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

⁴¹¹ See cases: See i.e. cases: *Loizidou v. Turkey*; *Manitaras and Others v. Turkey*; *Chiragov and Others v. Armenia*.

⁴¹² Knox 2013: 17.

of many States' jurisdictions and non-State actors' activities.⁴¹³ Therefore, tackling emissions and other sources of pollution might be complicated without undertaking a coordination among States. At the same time, considering that climate change has the potential to negatively affect the human rights of people all around the world, there would be the necessity to contemplate an extraterritorial application of a human rights-based approach to climate change according to which human rights obligations could be applied also beyond the territorial borders and the jurisdiction of a State (meaning those territories where a State anyway exercises an effective control).⁴¹⁴ This would also help addressing the problem of injustice related to the fact that the countries emitting the lower percentage of GHG are also the ones suffering the most for the negative consequences of climate change; within this context, limiting human rights duties to a territorial or jurisdictional application would leave those who suffer for such serious consequences of climate change unable to enforce their rights against the providers of such harm. As a consequence, the necessary expansion of the human rights obligations with regard to an extraterritorial responsibility for human rights would be one of the most difficult challenges in developing a human rights-based approach to climate change. In this regard, critics have been moved⁴¹⁵ with respect to the fact that if it is possible to affirm that a State has obligations to adopt effective mitigation measures in order to prevent the transboundary harm posed on human rights by climate change, then the argument that a State has no obligations to directly protect human rights merely because the harm is extra-territorial is not a reasonable one:⁴¹⁶ for instance, the non-discrimination principle of human rights law would in fact require a polluting State to give to environmental extra-territorial harassments the same consideration given to domestic harassments. However, it must be found that due to the cumulative contributions of different States to climate change it would be difficult to find a direct connection with the victim, and thus it would be difficult to affirm jurisdiction or control on persons in the concrete case. As a consequence, another

⁴¹³ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁴¹⁴ See i.e. cases: *Loizidou v. Turkey*; *Manitaras and Others v. Turkey*; *Chiragov and Others v. Armenia*.

⁴¹⁵ Boyle A (2012) Human rights and the environment: where next? *Eur J Int Law* 23(3):613

⁴¹⁶ (Ibid.) Boyle A (2012) Human rights and the environment: where next?

way to extend human rights obligations at the extraterritorial level would be required. In this regard, John Knox, the Special Rapporteur on human rights and the environment, has suggested an option. This would consist in developing a new jurisprudence in the field of human rights which is based on international cooperation obligations.⁴¹⁷ Knox starts from the idea that conceptualizing the climate change impacts on human rights as a random lottery of particular consequences, and try to force the idea of addressing them by incorporating extraterritorial duties to the human rights jurisprudence, may not be that useful⁴¹⁸, and this is due to the fact that while States could control the emissions they produce, they do not have an effective control over the consequences of these emissions, thus making it difficult to identify particular rights-holders who could bring the violation of their rights against a particular State; instead, in the context of human rights, climate change should be better understood as a “set of simultaneously occurring transboundary harms that should be addressed by each State trying to take into account its individual contribution to the effects of climate change in every other State in the world”;⁴¹⁹ In this sense, Knox insists on the necessity of an understanding of human rights and climate change which is based on international cooperation duties: he relies on the fact that States have already agreed under the UNFCCC and the Paris Agreement to treat climate change as a “global problem which requires global solutions”⁴²⁰ and the work of the Human Rights Council and of the Office of the High Commissioner for Human Rights have been also oriented in this sense, demonstrating the necessity of international cooperation on the matter. Therefore, what is here at stake is the question whether legal obligations of States to cooperate and coordinate their activities at the international level in order to address the impacts of climate change on human rights are required. In this regard, it is relevant to notice that

⁴¹⁷ Knox J (2016) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc A/HRC/31/52, presented to the Human Rights Council 31st sess, Agenda Item 3 (1 February 2016)

⁴¹⁸ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁴¹⁹ (Ibid.) Knox J (2016) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. UN Doc A/HRC/31/52, presented to the Human Rights Council 31st sess, Agenda Item 3 (1 February 2016)

⁴²⁰ Human Rights Council, Resolution 7/23 “Human Rights and Climate Change” A/HRC/RES/7/23, 28 March 2008.

the use of international cooperation in order to promote and protect human rights “lies at the heart”⁴²¹ of the Charter of the United Nations⁴²² and is explicitly recognized by many other International Treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), The Convention on the Rights of the Child, and the Convention on the Rights of People with Disabilities.⁴²³ In particular, the ICESCR and the ICCPR contemplate the idea of international cooperation in order to define obligations with regard to the rights protected under them, and in doing so the ICESCR uses a wider language: Article 2 of the ICESCR, refers to the obligation of State Parties to take steps towards the realization of the rights recognized in the Covenant through the aid of international assistance and cooperation, especially economic and technical, to the maximum of their available resources.⁴²⁴ Moreover, with regard to the right to an adequate standard of living, the ICESCR explicitly affirms the “essential importance of international cooperation”.⁴²⁵ On the other hand, the ICCPR stresses that Parties shall “promote universal respect for, and observance of human rights and freedoms”.⁴²⁶ The language adopted by the two Covenants is different, but both of them seem to contemplate the idea that responsibility for human rights is not limited within the borders of a State, but requires instead an international cooperative response.⁴²⁷ Therefore, a minimum legal basis, albeit indirect, for identifying such legal obligation upon States does exist, and a substantive content to it has also been provided by the Committee on Economic, Social and Cultural Rights in its General Comment No. 3: the Committee, in fact, individuates four ways in which the human rights obligations to cooperate internationally under the ICESCR apply at the extraterritorial level: 1) by refraining from creating interferences with the enjoyment of human rights in

⁴²¹ (Ibid.) OHCHR Report.

⁴²² Charter of the United Nations, Article 1, para. 3, 55 and 56.

⁴²³ ICESCR, Artt. 2, para. 1, 11, para. 2, 15, para. 4, 22 and 23; Convention on the Rights of the Child, Artt. 4 and 24, para. 4; CRPD, Art.32.

⁴²⁴ ICESCR Art.2.

⁴²⁵ ICESCR Art. 11.

⁴²⁶ ICCPR preamble.

⁴²⁷ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

other States; 2) by taking measures in order to prevent third parties (e.g. private companies) within the territory or jurisdiction of the State from interfering with the enjoyment of human rights in other States; 3) by taking steps through international assistance and cooperation, depending on the availability of resources, to facilitate the fulfilment of human rights in other States, including by providing for disaster relief, emergency assistance, and assistance to refugees and displaced persons; 4) by ensuring that human rights are given an important consideration in international agreements and that such agreements does not negatively affect human rights.⁴²⁸ It is relevant to observe that the OHCHR, relying on these applications of human rights duties at the extraterritorial level as identified by the Committee on Economic, Social and Cultural Rights, tried in its 2009 Report to create the basis for shaping a system of international-level human rights obligations which could have been applied in the context of the climate change: this hypothetical framework could represent a possible outcome of the adoption of a human rights-based approach to climate change, approach which would necessarily need to be made operative at the extraterritorial level in order to address a phenomenon such as climate change which has by nature an extraterritorial dimension. The ideas of the OHCHR with regard to this system of human rights obligations in the context of climate change will be further described in the next paragraph. By now, returning to the subject concerning the extraterritorial applications of the human rights obligations on international cooperation as provided under the ICESCR, there are some considerations which is necessary to make. First of all, despite the existence in the wordings of the Covenants of such a suggestion that an extraterritorial responsibility for human rights do exist, States have strongly denied any interpretation of the ICESCR which calls for a legal obligation of States to provide for assistance to other States.⁴²⁹ This is also due to the fact that, as underlined by John Knox, the interpretation provided by the Committee on Economic, Social and Cultural Rights does not *per se* have any legal force, and in no case it could anyway find application with respect to the civil and political rights protected under the

⁴²⁸ Committee on Economic, Social and Cultural Rights (1990) *General Comment 3: Nature of States Parties' Obligations (Art 2, para 1 of the Covenant)* UN Doc E/1991/23 (14 December 1990)

⁴²⁹ Knox J (2009–2010) Climate change and human rights law. *Va J Int Law* 50:163

ICCPR, due to the explicit dispositions in the latter which limit the application of the Convention only to individuals within a State's territory or jurisdiction.⁴³⁰ Within these aspects, the possibility for human rights obligations to find extraterritorial application is therefore limited. As a consequence, where it can be ensured that a State has an effective control in relation to certain activities or people in the territory of another State, then human rights obligations can apply;⁴³¹ at the same time, if a State's actions within its own territory cause a direct harm to people in other States, then a responsibility for those actions can be recognized. But it is more problematic to recognize obligations and responsibilities where the linkage between actions and consequences is too remote, as it is the case with GHG emissions causing climate change, where the consequences are the result of a cumulative effect of the actions of many States.⁴³²

B.2 The OHCHR's System of International-level Human Rights Obligations in the Context of Climate Change

As underlined in the previous paragraph, the interpretation provided by the Committee on Economic, Social and Cultural Rights with respect to the way in which the human rights obligations of international cooperation could be concretely applied at the extraterritorial level, has led to the theorization, operated by the OHCHR in its 2009 Report, of a framework of human rights obligations which could be applied to States in context of climate change on the basis of an international cooperation (at the international level). This outcome of the OHCHR's Report is important for what regards the idea of building a framework

⁴³⁰ *International Covenant on Civil and Political Rights*, Article 2. 999 UNTS 171, opened for signature 16 December 1966, entered into force 23 March 1976

⁴³¹ (Ibid.) Lewis B. (2018) *Challenges Confronting a Human Rights-Based Approach to Climate Change*.

⁴³² (Ibid.) Lewis B. (2018) *Challenges Confronting a Human Rights-Based Approach to Climate Change*.

of human rights obligations which could be applied to States in order to contrast the many threats of climate change, both at the national and international level. This is another step towards the adoption of a human rights-based approach to climate change, and therefore, for the purpose of this paper, it deserves to be considered. In this respect, the OHCHR proposes four different types of international human rights obligations, which represent the exact transposition of the previously observed extraterritorial extensions of the duty to cooperate internationally: namely, 1) States must refrain from interfering with the enjoyment of human rights in other countries; 2) States must take measures in order to prevent that third parties, such as private companies over which they exercise an influence, interfere with the enjoyment of human rights in other countries; 3) States must take action through international cooperation, depending also on the availability of resources, in order to encourage the fulfillment of human rights in other countries; 4) States must ensure that human rights are given an important consideration in international agreements and that such agreements does not negatively affect human rights.⁴³³ For the purpose of this analysis, and in order to strengthen the idea of a concrete possible application of these obligations as theorized by the OHCHR, it could be relevant to mention that, for what concerns the first two orders of obligations, a theory, albeit contested by many authors, has been established and developed in the jurisprudence of the International and Regional human rights Courts,⁴³⁴ according to which States are under an obligation not to allow within their jurisdiction any activity which could harm other States, as well as individuals in other States.⁴³⁵ This theory was actually established in order to resolve the problem of compensation between States, in cases where one of them, or their citizens, ended up suffering for an action or an omission put in place in another State; in this sense, anyway, it appears obvious that where an obligation to compensate exists, there must also exist an obligation to safeguard from the

⁴³³ (Ibid.) Marc Limon, "Human rights obligations and accountability in the face of climate change" Vol.38:543.

⁴³⁴ See i.e. the Arbitration Tribunal's decision in the "*Trail Smelter case*".

⁴³⁵ "*Human Rights and Climate Change*" a review of the international legal dimensions; A World Bank study; Authors: Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani

hazards which call for such compensation. For instance, in the *Trail Smelter Case*,⁴³⁶ a Canadian smelter enterprise exhausted toxic fumes that caused damages in the neighboring US State of Washington. The case went to International Arbitration, where the arbitrators held that States were under an obligation to prevent to let their territories be used in a way which could cause harm in other countries. Starting from this case, this theory became famous in international law as the principle of good neighborliness. Continuing with the international obligations' analysis, for what concerns in particular the last two obligations (of international cooperation and of ensuring that human rights are given an important consideration in international agreements), the OHCHR precises that international cooperation is also at the basis of the framework provided by the United Nation Framework Convention on Climate Change (UNFCCC), and in particular it is enforced in the principle of "common but differentiated responsibilities", according to which the developed countries (identified by the Convention as Annex I Countries, as observed in Chapter I of this paper) are committed to assist the less developed countries (non-Annex I) "in meeting the costs of adaptation to the adverse effects of climate change and to take full account of the specific needs of the least developed countries in funding and transfer of technology"⁴³⁷ The most relevant aspect underlined by the OHCHR in its analysis consists in the affirmation that international human rights law principles and standards complements the UNFCCC by underlying that "international cooperation is not only a matter of the obligations of a State towards the other States, but also of the obligations towards individuals",⁴³⁸ meaning basically that international cooperation is not only an expedient for the realization of human rights, but is in itself a human rights obligation and thus its central objective is the realization of human rights.⁴³⁹ This is probably the most important contribution of the OHCHR to both the evolution of human rights law

⁴³⁶ Trail Smelter Case (United States v Canada), Arbitral Tribunal, Washington D.C., 15 April 1938, 11 March 1941.

⁴³⁷ OHCHR 2009 Report, explaining the UNFCCC's principle of "common but differentiated responsibilities", para. 87.

⁴³⁸ (Ibid.) OHCHR 2009 Report.

⁴³⁹ (Ibid.) OHCHR 2009 Report.

and potentially of climate change policy,⁴⁴⁰ as it could provide for a framework of more complete definitions of the duties which are applicable to States under human rights law in order to address climate change. In conclusion, the result of the OHCHR's analysis should be considered as suggesting that all States which are Parties to the abovementioned International Human Rights Treaties have legal obligations through international cooperation to reduce emissions to levels which are consistent with the full enjoyment of human rights in all the other countries: an outcome which represents a key aspect of the adoption of a human rights-based approach to climate change.

Part C Human Rights Obligations relating to Climate Change at the National Level

C.1 Foreword

In the Part B of this Chapter, an explanation of the outcomes of the adoption of a human rights-based approach to climate change has been provided with respect to the obligations which could apply to States at the international-level for protecting human rights against the negative effects of climate change. Anyway, within the same purpose, an explanation of which are the national-level obligations that could bind States to provide the same protection of human rights against climate change could be identified. In order to shape these national-level obligations, we will focus again on the findings of the OHCHR in its 2009 Report, but precisating that this time the outcomes of the OHCHR does not derive purely from the interpretation of human rights obligations as provided by the Committee on Economic, Social and Cultural Rights. Instead, the identification of the national-level human rights obligations applicable to climate change comes this

⁴⁴⁰ (Ibid.) Marc Limon, "Human rights obligations and accountability in the face of climate change" Vol.38:543.

time from a general system of procedural and substantive obligations applicable to States in order to provide for the protection of human rights against environmental harms; in particular, this system of procedural and substantive obligations is the result of a complex work of interpretation and revision of all the sources of international human rights law and environmental law, which has been provided by an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment, Mr. John Knox, as appointed by the Human Rights Council in its Resolution 19/10,⁴⁴¹ with the aim, following the everyday more concrete reality of a connection between human rights violations and environmental degradation, of deriving a system of obligations applicable to States for providing a protection of human rights even against those harms and threats coming from difficult contexts such as the environmental one. The Independent Expert describes his work in a Report,⁴⁴² which provides for both procedural obligations of States in order to assess environmental impacts on human rights, and substantive obligations of States in order to adopt legal and institutional frameworks that protect human rights from environmental harms. In this Part of the Chapter, we will then observe first which are these procedural and substantive obligations, and then which are the corresponding national level obligations applicable to States in the more specific context of climate change, theorized by the OHCHR on the basis of the procedural and substantive ones. While reading such analysis, however, it is important to keep in mind that all these systems of obligations are continuing to be studied and clarified as they continue to evolve together with the many interconnections of rules and principles applicable in the broadest fields of human rights and the environment; as a consequence, the framework described is still open to further elaboration.

⁴⁴¹ See. Human Rights Council Resolution 19/10.

⁴⁴² Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment A/HRC/25/53.

C.2 Procedural Obligations

One of the most important results coming from the work of interpretation and revision of the Independent Expert is the finding that all the human rights sources analyzed impose several procedural obligations on governments in relation to the negative impacts of their activities on the environment (and correspondingly on human rights); these, in particular, include duties to: a) assess environmental impacts and ensure the publicity of environmental information;⁴⁴³ b) facilitate the participation of citizens in the environmental decision-making, providing also for the protection of the rights to expression and association; c) provide access to effective remedies in case of harm.⁴⁴⁴ All these obligations derive from civil and political rights, but they have been extended and adapted to the environmental context on the basis of the existence of a large amount of human rights at risk due to environmental harm. For what concerns the duty of assessing and providing information, it's relevant to observe that Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) recognize "the right to seek, receive and impart information".⁴⁴⁵ In particular, many human rights bodies have stressed that in order to protect human rights from environmental harm, States should ensure the access to environmental information and provide for the assessment of environmental impacts that may interfere with the enjoyment of human rights (which means basically that States should assess GHG emissions - i.e. through decisions about fossil fuels developments or fuel economy standards - for those activities which are more likely to have significant GHG impacts and publish the results).⁴⁴⁶ For instance, in its General Comment No. 15 on the right to water, the Committee on Economic, Social and Cultural Rights (the Treaty Body of the ICESCR), considered that individuals should have the full and equal possibility to access information regarding water and the environment, and it has suggested that States

⁴⁴³ (Ibid.) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

⁴⁴⁴ (Ibid.)

⁴⁴⁵ ICCPR Art 19. UDHR Art 19.

⁴⁴⁶ UNEP Report, page 16.

should assess the impacts of their actions which could result in a negative environmental effect on the right to health and water.⁴⁴⁷ The right of access to information is generally considered as a prerequisite in order to exercise the other procedural rights of public participation and access to remedies, which in turn are critical for the exercise of many human rights such as the rights to life, health and privacy.⁴⁴⁸ As a consequence, many regional human rights Courts have found that the obligation for States to assess predictable environmental risks and make public the results is part of their duties to protect, respect and fulfill human rights.⁴⁴⁹ On the other side, at the International level, States have adopted an effective practice for assessing and providing for information about climate change: the Intergovernmental Panel on Climate Change (IPCC) which, through its Assessment Reports, provides for specific assessments of the scientific aspects of climate change, for information about the vulnerability of natural ecosystems and for mitigation and adaptation options to be taken as suggestions from States.⁴⁵⁰ It could be useful to notice that the UNFCCC also imposes specific duties of information to the State Parties with respect to the climate change; in particular, Article 4 requires States “to promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, socio-economic and legal information related to climate change, and to the economic and social consequences of the various mitigation and adaptation strategies”.⁴⁵¹ For what concerns the obligation to facilitate public participation in environmental decision-making, this obligation arises as well from the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR),⁴⁵² which recognize the corresponding “right of everyone to take part in

⁴⁴⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002) on the right to water (para 48).

⁴⁴⁸ See CESCR, General Comment No 14.

⁴⁴⁹ See i.e. the case *Öneryildiz v. Turkey*, where the European Court of Human Rights derived the right to information from the right to life.; see as well the case *Guerra and Others v. Italy*, European Court of Human Rights, judgment 19th of February 1998 and the case *Cordella and others v. Italy*, European Court of Human Rights, judgment 24th of January 2019.

⁴⁵⁰ (Ibid.) Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

⁴⁵¹ UNFCCC Art. 4(2)(b). Article 6 also directs the Parties to promote and facilitate at the national and subregional/regional levels, “public access to information on climate change and its effects.”.

⁴⁵² UDHR Art. 21; ICCPR Art 25.

the government of their country and in the conduct of public affairs”.⁴⁵³ Many other human rights treaty bodies have also observed that governments have an obligation to encourage the participation in environmental decision-making in order to protect their citizens from environmental harm. For instance, the Committee on Economic, Social and Cultural Rights has stressed that States should consult with stakeholders during the course of environmental impact assessments, and has specified that before taking any action which may possibly interfere with the enjoyment of the right to water, governments must provide for a “genuine consultation with those affected”.⁴⁵⁴ It becomes evident then the importance that this duty acquires in the making of State’s climate policies; it’s enough to look at Article 6 of the UNFCCC, which requires State Parties to promote and facilitate public participation, as it reflects the idea that the Convention seeks to inhibit the negative impacts of climate change by allowing the society to be part of the solution.⁴⁵⁵ The rights of freedom of expression and association are also extremely important in the context of the participation in environmental decision-making, and they must be guaranteed to all people in relation to all climate-related actions. In this regard, it is relevant to notice that, in fact, trying to prevent people from expressing their opinion or views on a given climate-related policy or project constitutes a violation of their human rights independently from the fact that they act individually or in a group.⁴⁵⁶ Finally, the obligation of providing access to an effective remedy can be observed in many human rights agreements starting from the Universal Declaration of Human Rights and including also the ICCPR and ICESCR, as they all recognize the principle that States should ensure an effective remedy for the violations of human rights that they protect.⁴⁵⁷ The respective Treaty Bodies of these Treaties have observed that such principle can be extended to the human rights violations

⁴⁵³ UNEP Report, pag 17.

⁴⁵⁴ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, available at: <https://www.refworld.org/docid/4538838d11.html>.

⁴⁵⁵ UNFCCC Article 6(a). For a broader discussion see [“https://unfccc.int/topics/education-and-outreach/workstreams/education-and-training”](https://unfccc.int/topics/education-and-outreach/workstreams/education-and-training)

⁴⁵⁶ (Ibid.) Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.

⁴⁵⁷ UDHR Article 8; ICCPR Article 2 (3); ICESCR Article 2.

which occur due to environmental harms (and thus due to climate change). More precisely, there are both a procedural and a substantive dimension to this obligation: the procedural dimension regards the fact that States must guarantee to their citizens the access to administrative and judicial proceedings in order to address claims for human rights violations; the substantive dimension, on the other side, regards the necessity for States to guarantee at the same time compensation or other forms of redress when violation of human rights occur.⁴⁵⁸ For example, the Committee on Economic, Social and Cultural Rights has stressed that States should provide for an “adequate compensation and/or alternative accommodation”⁴⁵⁹ to indigenous people whose lands ends up being flooded due to the negative effects of climate change. At a regional level, the European Court of Human Rights affirmed that individuals must be given the possibility to appeal to the Courts against any decision, act or omission where they believe their interests have been prejudicated or their words and opinions have not been sufficiently considered in a government decision-making process.⁴⁶⁰ Within this context, for instance, States should provide for monetary compensation or injunctive reliefs for the violations of the right to freedom of expression in connection with climate-related projects. The Independent Expert who provided for the extensive interpretation of these human rights law obligations applying them to the context of environmental harm, clarified that in any case not all the States recognized these norms as having a legal force with their regard; this is also due to the fact that while some of these norms come from statements in Human Rights Treaties or from Tribunals which have the authority to issue binding decisions for the States under their jurisdiction, other statements are just interpretations from experts which does not have any legal or binding force in themselves. Despite the diversity of the sources where these obligations come from, however, these norms are still coherent and provide for a strong evidence that it is possible to realize uniformity and certainty in the field of human rights obligations related to the environment (and thus to climate change). In these terms, the Independent Expert encourages States to “accept these

⁴⁵⁸ UNEP Report, pag 18.

⁴⁵⁹ ICESCR Report, Section III. A.3.

⁴⁶⁰ See. *Taskin v. Turkey*.

statements as evidence of actual or emerging international law”,⁴⁶¹ or at least to consider them as the best practices they could adopt in order to face the environmental implications on human rights.

C.3 Substantive Obligations

According to the Independent Expert, the content of the Substantive Obligations applicable to a State for the protection of human rights against environmental harm “depends on the content of the States duties with respect to the specific particular right threatened by the harm”.⁴⁶² Despite the variety of the rights which can be affected by environmental harm, the extensive interpretation of the many sources of human rights law and the many statements of the human rights bodies which has been operated by the Independent Expert in order to derive a system of human rights obligations applicable in the environmental context, has provided for univocal conclusions. Although, as previously said, the framework provided by the Independent Expert cannot be considered as definitive, (because the system of human rights obligations connected to environmental harms evolve at the same rhythm as both human rights law and environmental law evolve), it has been possible to identify that States have general substantive obligations: 1) to adopt and implement a legal framework that provides for protection against environmental harm which may interfere with the enjoyment of human rights; 2) to ensure that private actors refrain from provoking such environmental harm. The legal framework must guarantee that the States who adopt it will respect human rights in all of their activities and decisions, and will protect them from the environmental harm which could possibly be caused by private actors within their territories.⁴⁶³ In this regard, it is relevant to notice that according to the

⁴⁶¹ (Ibid.) Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.

⁴⁶² (Ibid.) Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.

⁴⁶³ UNEP Report, pag 19.

interpretation of the many human rights sources, the notion of “private actors” does include corporations as well as other governmental entities; in particular, according to the human rights source of the Guiding Principles on Business and Human Rights,⁴⁶⁴ States are required to protect human rights against the abuses procured within their territories and jurisdiction by third parties such as business enterprises and corporations, and they have as well an obligation to provide for remedies against these abuses caused by corporations: the logical consequence of these obligations is that States can therefore be held responsible for the actions and activities conducted by these private actors within their territories, and this results as a consequence of the violation by the State in itself of the duty to protect, while corporations themselves are also addressees of a responsibility to respect human rights. These rules are pillars in the field of business and human rights and, for the purpose of the framework we are describing, they apply to all the environmental human rights abuses, including infringements of human rights in relation to climate change. The substantive obligations have been derived from a number of human rights, and in particular from the rights to life and health. The derivation from these rights acquires more sense when looking at the way the protection of these rights is perceived by the human rights bodies, which have frequently affirmed that the rights to life and health must be protected, *inter alia*, against environmental harms; for instance, the Human Rights Committee has noted that the right to life protected under the ICCPR cannot properly be understood if considered in a restrictive manner, and its protection requires States to adopt positive measures:⁴⁶⁵ in particular, it has been argued that States have a duty to use their legislative and administrative frameworks for providing protection against the infringements of the right to life caused by natural disasters or dangerous activities conducted by States or private actors.⁴⁶⁶ For what concerns the right to health, the International Covenant on Economic, Social and Cultural Rights affirms in Article 12 that States should take all the necessary steps, including the improvement of all the environmental and industrial hygiene

⁴⁶⁴ Guiding Principles on Business and Human Rights, Human Rights Council’s Resolution 17/4 (16 June 2011)

⁴⁶⁵ Human Rights Committee, General Comment No. 6: Article 6 on the Right to Life, para 5 (April 1982).

⁴⁶⁶ Council of Europe, Manual, pp. 18; European Court of Human Rights, *Oneryildiz v. Turkey*

aspects in order to achieve the full realization of this right.⁴⁶⁷ In this regard, in its General Comment No.14, the Committee has interpreted the statement “including the improvement of environmental and hygiene aspects” as requiring States to adopt positive measures against environmental health hazards such as the population’s exposure to chemicals and other harmful substances or to other detrimental environmental conditions which could have a direct or indirect impact upon human health and in addition the Committee has stressed that the protection against environmental harm must be activated by States also through the formulation and implementation of policies “aimed at reducing and eliminating pollution of air, water and soil”.⁴⁶⁸ Looking at these statements, then, it becomes clearer the derivation of the substantive obligations (to protect human rights against environmental harm) from the rights to life and health, as, according to the many human right bodies the protection of these rights includes the protection against environmental harm. More in general, the substantive obligations described imply the importance for States to incorporate human rights considerations into environmental law (and thus to adopt a human rights-based approach to environmental law and climate change), as this would be the only possible way to prevent infringement of human rights caused by the negligence of States in dealing with the environment; in this context, the Human Rights Council has observed that in fact “human rights commitments and obligations have the potentiality to inform and strengthen the international, regional and national policymaking in the field of environmental protection”⁴⁶⁹ and thus States must take into consideration human rights in their climate-policy making processes. Anyway, the Independent Expert observes that dealing with the substantive obligations to protect human rights from environmental harm does not necessarily imply the cessation of all activities which may cause environmental degradation: in particular, this would be in fact one of the main

⁴⁶⁷ ICESCR Article 12 para. 2(b)

⁴⁶⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14* para 36: *The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html>.

⁴⁶⁹ UN Human Rights Council, Resolution 16/11 “*Human rights and the environment*” adopted by the Human Rights Council, 12 April 2011, A/HRC/RES/16/11, available at: <https://www.refworld.org/docid/4dc1189b2.html>

benefits coming from the adoption of a human rights-based approach to climate change, as this would provide for attention to human rights in the climate policies of the States adopting such approach, thus directly operating a balance between potential dangerous activities for the environment and human rights' protection without necessarily require the interruption of these activities. In this regard, anyway, States have a certain discretion to strike a balance between the environmental protection and the other societal goals, such as economic and technologic development.⁴⁷⁰ What matters is that this balance does not result unjustified or result in foreseeable infringements of human rights; may this circumstance occur, there are a number of factors to consider before affirming that a State has failed in complying with its substantive obligations to protect human rights against environmental harm, including : 1) whether the level of environmental protection results from a decision-making process which satisfies the previously analyzed procedural obligations; 2) whether it complies with national and international standards; 3) whether it is not retrogressive or discriminatory. Among these factors, the international and national health standards are particularly relevant in the assessment on whether a balance is unjustified or is foreseeably violating human rights. For instance, in order to decide whether a State had failed to respect its obligations under the European Social Charter regarding the right to health, the European Committee of Social Rights assessed the harm caused by water-pollution on the basis of the water safety standards set by the World Health Organization (WHO)⁴⁷¹ and so did the European Court of Human Rights, who considered both national and WHO health standards for taking the decision whether States have reached justifiable balances between environmental protection and other interests.⁴⁷² Another important factor to consider when assessing whether an environmental decision meets human rights obligations is its retrogressive character. For instance, the Committee on Economic, Social and Cultural Rights has discouraged States to take retrogressive actions and measures with respect to the fulfillment of the

⁴⁷⁰ (Ibid.) Mapping Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.

⁴⁷¹ International federation for human rights (FIDH) v. Greece No. 72/2011, 23 January 2013.

⁴⁷² See *Dubetska and Others v. Ukraine*, 10 May 2011, No 30499/03.

rights protected under the ICESCR, as this would not comply with their obligation to move towards the full realization of rights (i.e. the realization of the highest attainable standard of health): in this regard, the Committee has specified that if States deliberately decide to take retrogressive measures, then they have a burden of proofing that before opting for these measures they had taken under consideration all the other alternatives, and that the measures adopted “are justified by reference of the totality of the rights provided for in the Covenant in the context of the full use of the State Party’s maximum available resources”.⁴⁷³ Only after a State has adopted this environmental-human rights-integrated framework into his national legislation, it must finally implement and comply with these standards; in fact, as observed by the European Court of Human Rights, “regulations to protect guaranteed rights serve little purpose if they are not duly enforced”.⁴⁷⁴ The system of substantive and procedural obligations described, which as previously said, derive from of a complex work of extensive interpretations operated over the human rights sources in order to find a connection with the environment and obtain human rights obligations applicable to States against environmental harm, is consequently the system which lies behind the theorization by the OHCHR of a framework of national-level human rights obligations applicable to States in the context of climate change, as climate change is in fact nothing but an expression of the environmental harm in question.

⁴⁷³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, para 32. 20 January 2003, E/C.12/2002/11, available at: <https://www.refworld.org/docid/4538838d11.html>.

⁴⁷⁴ *Moreno Gomez v. Spain*, 4143/02, [2004] ECHR 633, (2005)

C.4 The OHCHR’s System of National-level Human Rights Obligations in the Context of Climate Change

After the analysis of which are the procedural and substantive obligations identified by the Independent Expert in its Mapping Report, we can now observe which are, correspondingly, the national-level obligations, derived from the observed procedural and substantive framework, that in the vision of the OHCHR could be applied to States in order to provide a system of national human rights obligations with respect to climate change: another step towards the realization of a human rights-based approach to climate change. In particular, after saying that the physical impacts of global warming cannot be easily classified as direct human rights violations in themselves, the OHCHR 2009 Reports continues: “yet, addressing that harm remains a critical human rights concern and obligation under international law”.⁴⁷⁵ In this regard, the OHCHR recognizes three different national human rights obligations which are applicable to climate change in order to address (in any case) such harm: the first one implies that, despite climate change can worsen the conditions of the natural resources available, States remain under an obligation to ensure “the widest possible enjoyment of economic, social and cultural rights under any given circumstances”.⁴⁷⁶ Second one relates to the importance of guaranteeing the full enjoyment of procedural rights, including access to information, participation in decision-making, and access to the administrative and judicial remedies especially for the vulnerable groups of individuals; these measures are in fact considered of vital importance for the success of national efforts in addressing climate change. Third, each State’s climate change policy-making must consider any human rights standard and principle, such as equality, non-discrimination and universal access to basic levels of economic, social and cultural rights in order to promote the “policy coherence and sustainable outcomes”⁴⁷⁷ and to make sure that policy solutions are directed towards those parts of the population which are the most vulnerable

⁴⁷⁵ OHCHR 2009 Report, *supra* note 334, para 70 n. 104.

⁴⁷⁶ (Ibid.) OHCHR 2009 Report, para 77.

⁴⁷⁷ (Ibid.) para 80-83.

and in need.⁴⁷⁸ Looking at these system of obligations, it's easy to recognize the influence of the procedural and substantive obligations as previously identified. Moreover, in this scheme, it is relevant to notice that while the last two orders of obligations, which basically suggest that well-governed and developed societies are more adaptable and climate-resilient than the progressive ones, are reasonable and relevant points, the first obligation - which states that independently from the additional burden posed on States by climate change they must still guarantee the same level of respect, protection and fulfillment of their citizens' human rights - seems to lose credibility when applied from the point of view of those States which are vulnerable and not able to respect, protect and fulfill human rights, such as the State of Maldives. Those States in fact, have a major difficult to guarantee such rights due to the irresponsible environmental actions of the other countries beyond their borders and effective control, (which, as discussed in the first Chapters of this paper, are the major responsible for human-induced climate change with the worse effects on those countries -such as Maldives- which contributed the less to it) but still are asked to maintain the same level of legal obligations to respect, protect and fulfill the rights of their people. However, this gap and disproportionated judgment on the application of national-level obligations can be partially and indirectly balanced by looking at the equally forceful conclusion of the OHCHR that parallel and mutually inclusive obligations exist at the international-level,⁴⁷⁹ moving, as previously discussed, from the assumption that human rights obligations of international cooperation can find an extraterritorial application, as interpreted by the Committee on Economic, Social and Cultural Rights.⁴⁸⁰ In fact, if on one side the Report says very little about the content of each State's duties concerning climate change, on the other side it recognizes that these duties are not limited territorially; in

⁴⁷⁸ Marc Limon, "Human rights obligations and accountability in the face of climate change" Vol.38:543. "Mr. Limon drafted and negotiated the Male' Declaration on the Human Dimension of Global Climate Change, and Human Rights Council Resolutions 7/32 and 10/4 on Human Rights and Climate Change. He was also part of the Maldives negotiating team at the Fifteenth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Copenhagen, which secured the inclusion of human rights wording in the draft outcome document on Long-Term Cooperative Action".

⁴⁷⁹ (Ibid.) Marc Limon, "Human rights obligations and accountability in the face of climate change" Vol.38:543.

⁴⁸⁰ Committee on Economic, Social and Cultural Rights (1990) *General Comment 3: Nature of States Parties' Obligations (Art 2, para 1 of the Covenant)* UN Doc E/1991/23 (14 December 1990)

particular, it emphasizes that States have an international duty to cooperate for the realization of human rights, a duty which acquires a major importance with respect to climate change, which is, as we know, a global threat to human rights.⁴⁸¹ In conclusion, for what concerns in general the issue of human rights obligations in the light of climate change, the OHCHR emphasizes that the obligations existing both at the national and international level are interrelated and interdependent, in the sense that irrespectively of whether or not States are responsible for climate change, all States have in any case legal obligations to pursue “the widest possible enjoyment of human rights for their people”,⁴⁸² and, at the same time and at an equal level, States also have an extraterritorial legal obligation to refrain from interfering with the enjoyment of human rights in the other countries and to help the most vulnerable States adapting to the negative impacts of inevitable climate change. The Report, in fact, suggests that, in the context of climate change, both the national and international level obligations should and must be viewed together for the purpose of fulfilling universal human rights. However, it must be clarified that with respect to the many threats posed by climate change on human rights, international cooperation only plays a supporting role, as “environmental harms whose causes and effects are within the jurisdiction of one State can and should be primarily addressed by that State”.⁴⁸³ In this light, nevertheless, climate change cannot be used by States as an excuse for not providing the full enjoyment of human rights, considering also that the fulfillment of human rights by the most vulnerable States will only be possible in a permissive international environment in which all States respect their extraterritorial rules and obligations. There are in any case some challenges which necessarily require international cooperation in order to be addressed.⁴⁸⁴

⁴⁸¹ (Ibid.) John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

⁴⁸² (Ibid.) Marc Limon, “Human rights obligations and accountability in the face of climate change” *Vol.38:543*.

⁴⁸³ Mapping Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, submitted in occasion of the Human Rights Council General Assembly’s Thirty-first session. 1 February 2016, *A/HRC/31/52*.

⁴⁸⁴ For instance, the International Court of Justice has recognized that international cooperation is necessary in order to recognize “the universal character of the condemnation of genocide” and in order to “liberate mankind from such an odious surge”, *International Court of Justice, advisory opinion of 28 May 1951 on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p 23.

The only possible consequence resulting from these findings, is that climate change is a paradigmatic example of a global threat which is basically impossible to address in an effective manner without a coordinated international action.⁴⁸⁵

CHAPTER IV

Outlining a Rights-Based Approach to Climate Change

4.1 Existing framework

Looking at the way the perception of climate change has turned, in the last few decades, from being a mere unpopular alarm of very few States (with the Male' Declaration) to being a question of vital importance for the survival of the same mankind, it is possible to affirm that this big shift in priorities is also partly connected to the fact that seeing climate change through human rights lenses has definitely changed the nature of the international debate on the matter. Everything that has been said until now, is functional to show how the adoption of a human rights-based approach to climate change could be the solution to the problems connected to the 'violations' of human rights and to the many injustices triggered by climate change through its disproportional impacts on the most vulnerable ones. In this regard, it's relevant to underline that the adoption of a human rights-based approach in relation to the global problem of climate change has been the aim, as we will discuss in this paragraph, of the last twelve years activities of the United Nation's Human Rights Council through a series of Resolutions on the matter. As observed in Chapter II, at the origin of the *excursus* on the existing relationship between human rights and climate change, lies the adoption of the Male' Declaration in 2007, which represents the very first attempt (when climate change was still a mere unpopular alarm of very few States) to

⁴⁸⁵ (Ibid.) Mapping Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

draw attention to climate change and its threats to the enjoyment of human rights carried out by a short list of small island States (including, *inter alia*, the Maldives, Indonesia and the Philippines).⁴⁸⁶ The fact that those countries more than others pushed for such a revolutionary reshape of the concept of climate change is because many of them were already assisting to its negative effects, as climate change was already producing severe consequences in their territories.⁴⁸⁷ The outcome of the Male's initiative represents the first relevant call to include the human rights dimension in climate change issues. More precisely, these countries raised a point that became significantly relevant in the next Human Rights Council held on 28th of March 2008: at its seventh session, the topic of human rights and their enjoyment, was for the first time positively linked to the problem of climate change by an International Body of the UN whose main activity is to promote and protect human rights around the world. In fact, the Council recognized that by posing immediate threats to communities all around the world, climate change constitutes "a global problem which requires global solutions"⁴⁸⁸ and "has implications for the full enjoyment of human rights".⁴⁸⁹ The result of this Human Rights Council's session was the adoption of its Resolution 7/23 on human rights and climate change,⁴⁹⁰ in which the Council asked to the Office of the High Commissioner for Human Rights (OHCHR) to conduct an analytical study on the relationship between climate change and human rights;⁴⁹¹ starting from that moment, a large amount of successive resolutions managed to take into account climate change and its connection with human rights.⁴⁹² As already observed in the previous Chapters, the submission of

⁴⁸⁶ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

⁴⁸⁷ Therefore, many studies proofed that Maldives would not exist anymore, as a country, if the sea level keeps raising. As well as for Maldives, also Philippines is conscient of the bad consequences of the human-induced climate change; i.e. the storms and typhoon that affected part of the country had a bigger dimension due to the increasing of gas emissions.

⁴⁸⁸ Human Rights Council, Resolution 7/23 "Human Rights and Climate Change" A/HRC/RES/7/23, 28 March 2008.

⁴⁸⁹ (Ibid.) Human Rights Council Resolution 7/23, "Human Rights and Climate Change".

⁴⁹⁰ (Ibid.)

⁴⁹¹ The outcome will be the abovementioned OHCHR's 2009 Report on the relationship between climate change and human rights.

⁴⁹² Among these there is the Human Rights Council's Resolution 19/10, which, as observed in Chapter III, was aimed at appointing an Independent Expert on the issue of human rights obligations relating to the enjoyment of a clean, safe and healthy environment.

the OHCHR's Report⁴⁹³ to the Human Rights Council in January 2009, lightened the idea that obligations deriving from human rights must influence the policy-making process related to climate change, at the national and international level, strengthening and improving the defence of human rights when they come at stake; this should also be the primary aim of applying human rights obligations to States: to implement them in policies (such as the environmental and climate policy) in order for these policies to be human rights-oriented. This idea according to which human rights obligations can make States policies human rights-oriented, represents the starting point for the development of a human rights-based approach to climate change and will be better described in the next paragraph. Continuing to move along the chronological line of the events which gave rise to the idea of a human rights-based approach to climate change, following the Council's Resolution 7/23 and the consequent submission of the 2009 OHCHR's Report, another important Resolution (Resolution 10/4), was adopted in March 2009, in which the Council not only reaffirmed that climate change-related impacts are able to prevent or interfere directly and indirectly with the full enjoyment of human rights, but underlined that its effects are more likely to occur and to be most severely felt "by those segments of the population who are already in a vulnerable situation".⁴⁹⁴ This resolution, together with the prior Resolution 7/23 which opened the gate to a human rights approach in the climate change issue, constitute the basis also for the resolutions which followed. These will explain and analyse more in depth which are the connections among human rights and climate change, providing States with a possible strategy and solution to implement and shape concrete positive actions. But first, following a chronological timeline, and taking under consideration that the changes in this progressive openness towards a human rights-based approach are in close connection with these Human Rights Council's Resolutions, it must be mentioned that, as observed in Chapter II, the premises set up by these Resolutions, gave rise to the adoption by the State Parties to the UN Framework

⁴⁹³ OHCHR's 2009 Report following the Human Rights Council's Resolution 7/23.

⁴⁹⁴ UN Human Rights Council, Resolution 10/4 "Human Rights and Climate Change", adopted by the Human Rights Council, 25 March 2009, A/HRC/RES/10/4.

Convention on Climate Change (UNFCCC) in December 2010 of the Cancún Agreements, in occasion of the sixteenth Conference of the Parties of the UNFCCC (COP16).⁴⁹⁵ These Agreements, which result from the raised awareness (by the abovementioned Resolutions) on the topic of climate change-related impacts on human rights, are particularly relevant for the role they played in shaping the human rights-based approach existing framework, as they represent the first official decision ever made which recognizes the link between human rights and climate change in a clear and unequivocal language aimed at protecting human rights in a Climate Change Convention. They consist in a series of significant decisions taken by the international community in order to face the long-term problem of climate change collectively over time, and to take effective measures in order to accelerate the global response to it.⁴⁹⁶ Thanks to these Agreements and to the steps taken until that point, the relevance of human rights to climate change became universally recognized. As anticipated, there are other Human Rights Council's Resolutions which followed in the chronological line we are considering for reconstructing the many steps taken towards the conception of a human rights-based approach to climate change, such as Resolution 18/22, adopted in June 2011 right after the Cancún Agreements, which is important as it strengthened the idea, already introduced with the OHCHR's 2009 Report, that all the human rights obligations, standards, and principles have the potentiality of informing the international and national policy-making processes in the field of climate change, therefore improving policy coherence and sustainable outcomes.⁴⁹⁷ Another Resolution who came next was Resolution 26/27 three years after the last one, in July 2014, which is particularly relevant as it underlined the need for States to collaborate and communicate at

⁴⁹⁵ *Supra* note 120, UN Framework Convention on Climate Change, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010/ "Cancun Agreements".

⁴⁹⁶ UNFCCC's official website, "Intro to Cancun Agreements", available at "<https://unfccc.int/process/conferences/the-big-picture/milestones/the-cancun-agreements>". The Cancun agreements were reached on December 11 in Cancun, Mexico, at the 2010 United Nations Climate Change Conference, and represent the key steps taken forward the realization of plans in order to reduce greenhouse gas emissions, and to help developing nations protect themselves from climate impacts, therefore building their own sustainable futures.

⁴⁹⁷ Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change.

the international level in order to address in a more effective manner the negative impacts of climate change on the enjoyment of human rights. In this Resolution, the Council “called for dialogue, capacity-building, mobilization of financial resources, technology transfer and other forms of cooperation”⁴⁹⁸ in order to encourage mitigation and adaptation of climate change and in order to address the particular needs and circumstances of developing countries,⁴⁹⁹ and it is exactly on these last topics that the next Resolutions starting from 2015 to 2020 had focused on, adopting new perspectives on how mitigation and adaptation measures should be carefully adopted by States in order not to create more hazardous consequences and also calling for attention on the most vulnerable groups which may suffer the most due to climate change-related effects, such as children,⁵⁰⁰ immigrants,⁵⁰¹ persons with disabilities⁵⁰² and lastly the older persons.⁵⁰³ Looking at the dimension that the debate on climate change and human rights has assumed, then, it becomes clearer the idea of climate change as “a global problem which requires a global solution”,⁵⁰⁴ and the adoption of all these Resolutions demonstrates a clear development of the Human Rights Council towards the affirmation of a human rights-based approach, as it concretely realized how much the many climate change-related impacts can influence the enjoyment of human rights, therefore adopting documents which would have made this new awareness a common perspective and concern at the global level: the adoption of the Cancún Agreements abovementioned represents the result of this strategy of action. Anyway, the adoption of Resolutions on the matter is not the only tool at the disposal of the Human Rights Council within the context of the United Nations in order to address “either human rights situations or issues in all parts of the world”.⁵⁰⁵ In fact, there are some other mechanisms which can result quite helpful in improving the Council’s attempts to raise

⁴⁹⁸ Human Rights Council’s Resolution 26/27, July 2014.

⁴⁹⁹ (Ibid.)

⁵⁰⁰ See Human Rights Council’s Resolution 32/33, July 2016.

⁵⁰¹ See Human Rights Council’s Resolution 35/20, July 2017.

⁵⁰² See Human Rights Council’s Resolution 42/21, July 2019.

⁵⁰³ See Human Rights Council’s Resolution 44/7, July 2020.

⁵⁰⁴ (Ibid.) UN Human Rights Council, Resolution 7/23 “Human Rights and Climate Change” adopted by the Human Rights Council, 28 March 2008, A/HRC/RES/7/23.

⁵⁰⁵ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

awareness on the topic of climate change, and which are useful in addressing climate change especially in the context of specific human rights: these mechanisms consist in the Special Procedures. The Special Procedures are independent individual human rights mechanisms consisting in the appointment human rights experts or groups of experts with a specific mandate to report and advice on the many human rights issues; these experts are generally named Special Rapporteurs or Independent Experts and are in charge of their mandates for a maximum of 6 years.⁵⁰⁶ The Independent Experts and the Special Rapporteurs are particularly relevant and effective in the field of climate change, because they are able to communicate directly with States in case of alleged human rights violations, therefore making it possible for the latter to alter their mandates eventually including requests to consider the impacts of climate change on the human rights at stake in the concrete case.⁵⁰⁷ this shows that States are really starting to consider climate change and its severe consequences as threats for the fulfilment of human rights. For instance, when the mandate of the Special Rapporteur on the right to housing (which is, as observed in Chapter II, component on the right to an adequate standard of living), was renewed in December 2007,⁵⁰⁸ Germany worked in that occasion with the Maldives⁵⁰⁹ in order to include the climate change issue in the work of the Special Rapporteur, and climate change negative effects have also been taken under consideration in many Reports of the Special Rapporteurs on the right to food and to safe drinking water and sanitation.⁵¹⁰ Therefore, the Special Procedures mechanism confirms what stated above, namely that the influence of the outcomes of the Cancún Agreements on the way human rights are perceived with regard to climate change can produce important effects, as States have the chance to finally bring the issue of climate change to the attention of other States (including private actors) at the international level thanks to the tool of the Special Procedures and awareness on

⁵⁰⁶ International Justice Resource Center, “Special Procedures of the UN Human Rights Council”, available on the website “<https://ijrcenter.org/un-special-procedures/>”

⁵⁰⁷ (Ibid.) Restoring the Climate Change by Realizing Rights.

⁵⁰⁸ See Human Rights Council Resolution 6/27, Adequate Housing as a Component of the Right to an Adequate Standard of Living (UN Doc. A/HRC/6/22, 14 April 2008).

⁵⁰⁹ It has been already said, in this regard, that Maldives was in fact in the list of countries that pushed for highlighting the problem of climate change as affecting and impacting on human rights enjoyment.

⁵¹⁰ See Chapter II, Part B (a-b).

the problem can thus be globally raised. Notwithstanding innovative and relevant, however, the Special Procedures mechanism might not be completely effective, as, if on one side it calls for the attention of the international community and stakeholders on the issue of climate change, on the other side it still lacks the force of a hard law source. Anyway, as said before, this mechanism can surely influence the policy-making process of some States with regard to climate change, and it can do that at the international level as well, in particular during the negotiations of the UNFCCC, forcing for a more human rights-based approach which finds in these reports and works of the Special Procedures its fundamental basis. Another important mechanism within the UN that might be influenced by the innovative aspects of the Cancún Agreement is the Universal Periodic Review (UPR), a process conducted under the Human Rights Council, which consists in a review of the human rights reports of all the UN Member States, and allows States to declare which measures and actions they have taken in order to improve the situation of human rights in their countries and to fulfil their obligations under human rights law.⁵¹¹ This other important tool is aimed at improving human rights situations in every country by addressing human rights violations wherever they may occur. This mechanism acquires an important relevance in the context of climate change as well, as it allows each UN Member States to share its own human rights performance and to see “the degree to which it is complying with international human rights law as well as with its own laws and commitments”.⁵¹² In particular, UPRs are submitted every four years and a half, and the first has been completed in 2008, at the down of the first Human Rights Council Resolution 7/23 (2009) which was recognizing for the first time a linkage between human rights and climate change: 31 States at the end of the review raised up the issue of the climate change, in this group there was also Maldives, which asserted in its UPR Report that man-made climate change was existentially threatening a wide range of human rights in its territory, including, *inter alia*, the right to life, the right to the highest attainable standard of health

⁵¹¹ United Nations Human Rights Council website, “Universal Periodic Review”, available on the website “<https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>”

⁵¹² Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

and the right to adequate housing.⁵¹³ This was the very first attempt to bring the attention of the international main stakeholders and UN Parties not only on the climate change issue but also on its impacts which take origin from man-made actions. Anyway, once again and similarly to the Special Procedures mechanism, UPRs have limited influence (not a hard law source), therefore they doesn't constitute a tool for inhibiting the concrete consequences on human rights of States' behaviours in the climate change subject matter; this is mostly for two reasons: 1) except the case of the Maldives, the references to climate change in the UPR mechanism have failed to go beyond general statements of States regarding the recognition of climate change negative impacts on human lives and rights.⁵¹⁴ This is also due to the fact that under a legal prospective it is complicated for stakeholders in this field to recognize human rights obligations in the context of climate change, and consequently, States' (bad) actions causing it, since it is not always easy to find a breach that leads to accountability, as discussed in Chapter III. 2) even where there have been attempts to construct legal arguments for States' accountability under the international human rights conventions, which could have perhaps contributed to improving international climate change responses,⁵¹⁵ the impact of those arguments has tended to be quite weak.⁵¹⁶ The difficulties in defining States' obligations under human rights law and in particular the problem of States' accountability are important issues which must be taken into account when defining a 'human rights-based approach' to climate change. Only assessing these problematical although essential issues, in fact, a new vision regarding States' role in the field of human rights can be shaped with regard to climate change.

⁵¹³ (Ibid.) Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System.

⁵¹⁴ (Ibid.).

⁵¹⁵ See Chapter III para A.2: Difficulties to Hold a State Accountable: the problem of assessing responsibilities.

⁵¹⁶ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

4.2 A Newly shaped Approach to Climate Change: A Human Rights-Based Approach

After a general reconstruction of which is the existing framework lying behind the conceptualization of a human rights-based approach to climate change, it is now necessary to introduce which are the key elements and innovative aspects that can be observed with regard to a human rights-based approach. First of all, one of the main considerations which is necessary to make with regard to the human rights-based approach to climate change is quite simple, but still of fundamental importance: human rights principles and obligations binding States under international human rights law, carry with them a strong human rights-oriented potential, which, applied to the climate change issue, may really tackle the situation in a more efficient and effective way. This represents the main idea behind the work of the UN Human Rights Bodies carried out since very few decades, and constitute the same reason behind the need to shape such an approach to climate change. In order to understand exactly which are the main aspects of this approach, it would be convenient to start from broader considerations for then moving to more specific ones. In particular, it has been already said that one of the main goals of such approach is to influence both policy makers and policy making processes (at the national and international level): this would be possible by implementing human rights principles in these policies.⁵¹⁷ Human rights law provides in fact for an important number of principles, such as universality and inalienability, indivisibility, interdependence and interrelatedness, equality and non-discrimination, participation and inclusion, accountability and rule of law, which appear to be quite necessary to observe with regard to the climate change as a phenomenon able in itself to interfere with the enjoyment of many human rights which in any case require protection under these principles of human rights law. In particular, many of these principles find a correspondent human rights protection in many provisions of important Human Rights Conventions, and since the Cancún Agreements these

⁵¹⁷Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21), 2015 Paris. A/HRC/29/19.

principles have actually started to be considered with respect to climate change, as underlined by the words in the same Agreements: “[Governments] should, in all climate change-related actions, fully respect human rights”.⁵¹⁸ As a consequence, their absolute application and respect by States in climate change-related human rights issues is becoming little by little less utopic and more legally oriented. Indeed, what States are asked to do in order to realize this goal is fulfilling their obligations with actions, means or policies that must respect such principles: this means in concrete words making their policy-making processes (on climate change) human rights-based, so that States can take into account human rights principles already in the development of such policies, as underlined by the OHCHR in its submission to the 21st Conference of The Parties of the UNFCCC (COP21), according to which, “when policies and programmes are formulated, the main objective should be to fulfil human rights”.⁵¹⁹ The one just described represents one of the principal aspects of a human rights-based approach to climate change, even if its general understanding can be well applied also in more specific situations concerning States and representing threats to the full enjoyment of human rights, for instance in the context of States’ economic and political choices. In order to introduce the next core aspects of the rights-based approach to climate change, another key consideration concerning the issue of climate change needs be highlighted. As the Male’ Declaration tried to denounce for the very first time, climate change has undoubtedly origins in human beings’ actions and operations (within this context we speak about *anthropogenic climate change*, as underlined in Chapter I). It is proofed, in fact, that the industrialised countries, which consist in one fourth of the world population, are responsible of having polluted and produced greenhouse gasses for more than a half of the world’s current emissions.⁵²⁰ Small and developing countries most of the times are the ones suffering the worst consequences for the

⁵¹⁸ *Supra* note 120, UN Framework Convention on Climate Change, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010/ “Cancun Agreements”.

⁵¹⁹ (Ibid.) Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (COP21).

⁵²⁰ John H. Knox, *Linking Human Rights and Climate Change and the United Nations*, vol. 33, *Harvard Environmental Law Review* 477 (2009).

developed countries' behaviours.⁵²¹ Human rights law, as said before, encompasses a list of principles aimed at reducing the many differences among States and their populations, such as the principles of equality and non-discrimination, - according to which, all individuals are in fact "equal as human beings and by virtue of the inherent dignity of each human person"⁵²² - but at the same time provides the civil society and the international community the right to denounce and bring to general attention cases of human rights violations caused by Governments within their acts and omissions (accountability and rule of law principles). This latter aspect is very important, as it has been noticed that some States, when they had the chance, didn't miss the opportunity to bring before the attention of the UN Parties the problem of climate change-related impacts and its effects on the enjoyment of human rights caused by other States, and the example par excellence are the Maldives. The mechanisms described in the previous paragraph (Special Procedures and Universal Periodic Reviews) also encourage States to assume such a behaviour: nevertheless, as said before, they are not enough for the purpose of addressing climate change, as human rights systems and mechanisms still lack an effective judicial force when climate change is at stake; within this context, the way in which the effectiveness of the human rights judicial system could be strengthened with regard to human rights violations caused by climate change is still a pending question, and this is also due to the fact that the nature and origin of climate change makes it in itself very difficult to fit it in the normal concept of human rights violation, as observed in Chapter III. This is mostly because climate change affects at the same time many rights in a very unequal and disproportionated way depending on geographical zones.⁵²³ In this sense, the adoption of a human rights-based approach is important and innovative, since, following this approach, human rights protection might provide for a specific system of accountability and States' obligations, in view of

⁵²¹ That's why the countries that tried more than 10 years ago to focus attention on climate change and human rights were those not industrialised and in serious threats (such as the Maldives).

⁵²² Equality and Non-Discrimination Principle, as described by the United Nations Population Fund (UNFPA), available at "<https://www.unfpa.org/resources/human-rights-principles>"

⁵²³ Most industrialised countries produce emissions for more than half of the world, but they see a lower impact on human rights enjoyment compared to other countries which are less developed and industrialised.

the climate change specific dimension and nature: an example is the system of obligations at the national and international level identified by the OHCHR in its 2009 Report, which result from the adoption of a rights-based approach to climate change in the sense that, despite the many difficulties at the practical level which are related to the problem of extraterritoriality of human rights duties, it has been possible to theorize such obligations through an extensive interpretation operated by applying human rights obligations within the context of climate change. This is another of the main elements of a human rights-based approach whose aim is to broaden the possibilities of finding an equilibrium between climate change and human rights, equilibrium which would be visible not only in relation to a system of States' obligations on the matter, but also in other aspects such as the adoption of mitigation and adaptation measures, which should embody this approach in order for these measures to refrain from having negative consequences on the enjoyment of human rights and to make it easier for States to respect and fulfil human rights within their adoption: this means adopting a human rights-based approach to the climate change policy-making process. In this regard, it is important, as said, to guarantee the respect of human rights in the State's policy-making process, but while doing so, and this is another aspect upon which the adoption of a human rights-based approach calls for attention, it is also important to consider individuals, namely the human rights holders. Indeed, it is only by informing climate actions and policies with a human rights framework, and by encouraging people to participate in policy formulation, that States can "promote sustainability and ensure the accountability of all duty-bearers for their actions."⁵²⁴

4.3 Addressing a Human Rights-Based Approach to Climate Change: The Role of States' Responsibility and Accountability

Until now, it has been described how the human rights-based approach might introduce innovative ways to address climate change with respect to the

⁵²⁴ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

protection of human rights, and it has been observed that through this approach it is possible to give individuals and stakeholders the possibility to intervene directly in the formulation of climate policies in order to focus with more efficiency on the necessity to avoid human rights violations by States due to their negligence in addressing the climate crisis. Another relevant consideration regarding this approach, concerns the fact that thanks to the international human rights law, which is clearly the framework lying at the basis of the approach described, it is possible to identify who are the right(s) holders and who the duty bearers when the protection of human rights comes at stake. This is particularly relevant, since, thanks to these actors' roles, and to the existence of rights and obligations attributed to them under human rights law, it becomes easier the recognition of responsibilities attributable to States (although the problem of allocating them still remains an open issue);⁵²⁵ in fact, the human rights-based approach (or international human rights law) is based on a foundational system of responsibilities and legal obligations of States provided under international law and which derives from the idea that "the international law on State responsibility contains the rules⁵²⁶ for finding States responsible for violations of international law".⁵²⁷ In this regard, it's relevant to notice that the principle of State responsibility, which under international law assigns liability to States for the breaches of their international obligations, has been radically affected by international human rights law:⁵²⁸ the influence exercised by the latter, in particular, has given life to a doctrine on State responsibility for both human rights violations, (which ensures that there is always an actor responsible for human rights violations, so that human rights violations cannot in this way remain unpunished) and human rights obligations (so that an actor responsible of

⁵²⁵ See Chapter III, para. A.2.

⁵²⁶ "The rules on State responsibility are embodied in customary international law. However, the International Law Commission (ILC) adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) on 9 August 2001, which seek to codify these rules. The ILC referred them to the United Nations (UN) General Assembly (GA) for the latter to take note of them and at a later stage decide whether they should be adopted in the form of a convention or declaration". State Responsibility for Human Rights, Article by Danwood Mzikenge Chirwa, 5 October 2015, Law Explorer website, available at "<https://lawexplores.com/state-responsibility-for-human-rights/#ich21fn6>"

⁵²⁷ Exploring the Legal Basis of a Human Rights Approach to Climate Change. Article by Margaret Wewerinke and Curtis F.J. Doebbler.

⁵²⁸ (Ibid.) State Responsibility for Human Rights, Article by Danwood Mzikenge Chirwa, 5 October 2015, Law Explorer website.

upholding human rights standards can always be identified).⁵²⁹ As a consequence, these rules of international law consent to hold a State responsible for its actions or omissions which may have caused human rights violations, and the same counts for private actors, such as organizations and companies operating within a State's jurisdiction. Nevertheless, when applying the State responsibility doctrine in the context of climate change, there are some problems which could actually emerge. In fact, State responsibility is traditionally activated when a State acts in a contrary way from those which are its actual existing legal obligations.⁵³⁰ Then, in order to invoke this form of State responsibility, it must be found the existence of an act attributable to a State: within this context, attributability to States requires the assessment of whether a State could have acted in a way to avoid the violation of a legal obligation; As a consequence, this kind of State responsibility is applicable to the climate change context only as far as there exist a negative obligation not to act in a certain way or a positive obligation to act in order to ensure that a certain effect which is unlawful is prevented.⁵³¹ An example would be the legal obligations binding the developing countries under Article 4(2) of the UNFCCC, requiring States to adopt national policies and take corresponding mitigation measures against climate change, which should consist in the reduction of each State's anthropogenic GHG emissions.⁵³² With respect to this legal obligation, if a State fails to act even when it is in the position to do so, or it knows/could have known the consequences coming from its inaction (i.e. the increasement of GHG emissions), then a violation of its legal obligations under Article 4 of the UNFCCC can be identified, and it's possible to affirm that the State Party has committed an internationally wrongful act.⁵³³ However, (and here lies the problematic aspect of applying State responsibility in climate change issues), in these situations

⁵²⁹ (Ibid.) Exploring the Legal Basis of a Human Rights Approach to Climate Change. Article by Margaret Wewerinke and Curtis F.J. Doebbler.

⁵³⁰ Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the UN General Assembly in its Resolution 56/83 (12 December 2001).

⁵³¹ (Ibid.) Exploring the Legal Basis of a Human Rights Approach to Climate Change. Article by Margaret Wewerinke and Curtis F.J. Doebbler.

⁵³² UNFCCC, Article 4(2).

⁵³³ See Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148 (entered into force 16 February 2005) at Art. 3, and United Nations Convention on the Law of the Sea, 1833 UNTS 3 (entered into force 16 November 1994), at Art. 194.

States may actually disagree on which are concretely their legal obligations with respect to the GHG emissions, and this is particularly due to the many difficulties in allocating responsibilities among States for their emissions, as observed in Chapter III.⁵³⁴ This doesn't clearly exclude the existence of such obligations neither justifies their violations, but it calls even more for the necessity of an independent and impartial adjudicator which could better determine the existence or the scope of such legal obligations.⁵³⁵ Anyway, by now, the UNFCCC doesn't unfortunately provide for such a system of adjudication. Indeed, unlike the international human rights regime, the UNFCCC and the Kyoto Protocol do not provide for express provisions on remedies for individual or communities which may be affected by environmental harms, due to the problems concerning the allocation of responsibilities with regard to climate change, as observed in the previous Chapter. These issues are the ones which actually fragment the framework concerning States' obligations and therefore responsibilities. That's why a human rights-based approach to climate change would be very helpful in this regard, because, as said before, it would made clearer who are the right holders, and which the duties. Moreover, following this approach, international conventions on climate change as well as national policies, would not only be human rights oriented (which is the key in order to adapt each further decision to an environment in which human rights are fully respected and fulfilled), but would be based on some relevant assumptions: namely, they would point out in advance which are the States' (and private actors within their territories) obligations and the people's rights when the protection of human rights comes at stake in the context of climate change as described in the conventions and/or national policies. Therefore, States would consider in their climate policies the necessary actions for contrasting and decreasing climate change, applying at the same time within this context their duties to respect, protect and fulfil human rights (duties that inevitably need to be observed when the climate change negative effects come at stake, as discussed in Chapter II with regard to the single

⁵³⁴ Chapter III, para A.2.

⁵³⁵ (Ibid.) Exploring the Legal Basis of a Human Rights Approach to Climate Change. Article by Margaret Wewerinke and Curtis F.J. Doebbler.

human rights threatened by climate change and in Chapter III with regard to the application of these duties to the context of climate change in order to shape a framework of obligations on the matter). As observed in the previous Chapter, the failure in doing this would consequently cause a negligence by the public authorities, which could be then held responsible for having failed to comply with their human rights obligations in the light of climate change. But still the framework which would result from the adoption of a human rights-based approach to climate change needs to be either clarified or improved. In fact, although the problems related to the extraterritorial application of the obligations concerning human rights, another problem regards the fact that in climate change conventions some exceptions exist with regard to the general principles applicable to States under international law: these exceptions are particularly relevant as they have the potentiality to make the system illustrated less likely to perform its functionality. For instance, the principle of “common but differentiated responsibilities and respective capabilities”⁵³⁶ observed in Chapter II, which is contemplated within the UNFCCC’s framework under Articles 3 and 4, represents an exception to the general principle that all States are equal from the point of view of sovereignty, which means that basically all States have the same legal obligations.⁵³⁷ In fact, according to the principle of common but differentiated responsibilities, not all States can be found liable at the same way, and not all States should take and undertake the same actions and apply the same measures. This, as said before, leads to a fragmentation of the framework concerning States’ obligations in the context of climate change, because it doesn’t allow obligations’ substantive elements to be defined, and uncertainty remains on the point. This, together with the problem of extraterritoriality, is also part of the reason why many States and stakeholders deny possible responsibility on the issue, because it is not easy to provide for a proof which is strong enough to demonstrate that certain States’ actions or inactions have led to the violation of their duties to protect, respect and fulfil human rights in the context of climate change. Despite the evident difficulties, which could only be encompassed

⁵³⁶ UNFCCC Article 3

⁵³⁷ Exploring the Legal Basis of a Human Rights Approach to Climate Change. Article by Margaret Weverinke and Curtis F.J. Doebbler.

through international negotiations and through the natural evolutionary process of international law,⁵³⁸ the adoption of such approach in international negotiations and domestic policy-making processes is highly needed and expected. In fact, under this light, human rights are not and should not only be the main and last goal of the policies but also the benchmark for assessing and building States' accountability. Starting from this idea, it is possible to conceive climate change as a general responsibility that all States should address, and in particular through the use of international cooperation, as observed in Chapter III.

4.4 The Benefits linked to the adoption of a Human Rights-Based Approach to Climate Change

Despite the many difficulties underlined in the previous paragraphs, and despite as well the challenge of concretely overpassing the problem connected to an extraterritorial application of human rights obligations with respect to climate change, it is possible to affirm that the adoption of a human rights-based approach would provide many benefits for what concerns the protection of human rights against the negative effects of climate change. First of all, as already observed in the previous paragraphs, the adoption of such approach would make it possible to identify who are the right(s) holders and who the duty bearers when the protection of human rights comes at stake: this would help building a more concrete framework of obligations applicable to States concerning the protection of human rights against climate change negative impacts. and. But at the same time, the adoption of this approach would represent a silver lining also for what concerns the role of individuals as non-State actors in the international

⁵³⁸ This can be connected with Rosalyn Higgins' book where she defines international law as a "continuing process of authoritative decisions" that States put in place providing themselves with a normative discipline regulating their interactions and relations among each other's. Negotiations are thus important because States' behaviors in relation to climate change, both for reducing GHG emissions and for tackling in a cooperative way the problem of climate change, needs an international legal framework. For more details see *Book Problems and Process: International Law and How We Use It*. Author: Rosalyn Higgins., November 1995.

community. In fact, it would attribute a new role to the many vulnerable groups and individuals in order to actively join the international community on the matter of climate change, giving space to their voices and focusing on how to address their needs. In this sense, human rights could help considering issues of equity and vulnerability in the climate change debates. In fact, (and this is one of the most important outcomes of the adoption of such approach) a human rights-based approach poses the individuals at the center of our enquiry, thus helping to build a human face to the problem, for the purpose of “telling the stories of those who are more likely to be affected, serving as well as a tool for advocacy and promotion of public awareness of the injustices inherent in the problem”.⁵³⁹ Within this new conception of vulnerability, States’ obligations, at both the national and international dimensions, shall be directed toward these groups, and new responsibilities shall be included in the Conventions concerning climate change, bearing in mind the specific needs of the different groups and individuals. There are anyway other benefits that States could obtain through the adoption of a human rights-based approach to climate change. Some of them have already been mentioned, and in particular the ones according to which a human rights-based approach would recognize that adaptation and mitigation measures also have the potential of impacting on human rights, and thus it would encourage policy makers to take into account human rights while creating climate policies in order to minimize the potential negative consequences of these mitigation and adaptation strategies. In this regard, it could also be mentioned that this approach would be a benefit for climate policy development, due to the moral weight related to the concept of human rights; in fact, beside the use of human rights in order to provide legal duties, human rights have a deep value in the moral sense, so the adoption of such approach would suggest that climate change is not only a technical challenge, but also a moral one, and therefore this stresses for a deeper sense of gravity and moral urgency of the issue in itself.⁵⁴⁰ As a consequence, this moral vision of a human rights-based approach can help building more

⁵³⁹Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change. In: Environmental Human Rights and Climate Change. Springer, Singapore. https://doi.org/10.1007/978-981-13-1960-0_8

⁵⁴⁰ Knox J (2009–2010) Climate change and human rights law. *Va J Int Law* 50:163

pressure on governments in order to cut their GHG emissions levels. Another benefit regards the idea that a human rights-based approach would represent a tool of positive action and advocacy for groups who lack other avenues to act under international law:⁵⁴¹ in fact human rights provide for the possibility to conceive climate change not in terms of economic consequences or future impacts, but in terms of “current obligations and existing illegality”.⁵⁴² This encourages to consider not only which are the rights implicated, but also who are the duty bearers who should uphold those rights. In this sense, a rights-based approach to climate change helps giving account to relevant responsibilities in the context of climate change, and the stronger focus on obligations therefore helps strengthen accountability.⁵⁴³ An observation with regard to these two last orders of benefits is that they have “no cost” in the sense that “they are available even though legal enforcement options are limited”.⁵⁴⁴ Again, a human rights-based approach to climate change would also dispense a number of benefits from a procedural point of view; in fact, human rights provide for procedural standards which could help improving decision-making processes and negotiations: these include participation and consultation of a State’s authorities with the vulnerable groups as well as principles of equality, non-discrimination and respect for the rule of law. By improving these standards, human rights could also help reducing corruption and exalt legitimacy and sustainability of the climate and environmental policies’ outcomes. Moreover, human rights could provide for useful analytical tools for assessing the social consequences of climate change, establishing as well minimum acceptable levels of protection against climate change: this derives from the fact that a human rights-based approach examines each threat and harm as considered in its own rather than finding broadly applicable thresholds of minimum supportable levels of climate change⁵⁴⁵ (such

⁵⁴¹ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁵⁴² Bodansky D (2010) Climate change and human rights: unpacking the issues. *Ga J Int Comp Law* 38:511

⁵⁴³ McInerney-Lankford S et al (2011) Human rights and climate change: a review of the international legal dimensions. World Bank, Washington

⁵⁴⁴ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁵⁴⁵ Cameron E (2010) Human rights and climate change: moving from an intrinsic to an instrumental approach. *Ga J Int Comp Law* 38(3):673.

as the thresholds of “limiting global warming well below 2 C° compared to pre-industrial levels”).⁵⁴⁶ In conclusion, it’s possible to assume that there are several benefits which could result from the adoption of a human rights-based approach to climate change, despite the many problems concerning the possibility of successful claims for human rights violations under human rights law in the field of climate change.⁵⁴⁷ These are the result of the normative weight of human rights, and in particular from its ability to pay attention to the most vulnerable ones and to the individuals in general as centers of the enquiry. In this context, the human rights mechanisms already observed in the previous chapters (Special Procedures and Universal Periodic Reviews), as adapted in the light of a human rights-based approach to climate change, could also encourage States to take more effective actions towards the protection of human rights against climate change. Moving from this analysis, and therefore from the proof that good silver linings do exist when applying human rights in the field of climate change, some final considerations and recommendations about which could be the further steps taken by the international community towards the adoption of this approach will now be provided.

4.5 Objectives to pursue and Final Remarks

Using the words of the Special Procedures of the UN Human Rights Council in an open letter to the parties to the UNFCCC, “we call on the Parties of the United Nations Framework Convention on Climate Change (UNFCCC) to ensure full coherence between their solemn human rights obligations and their efforts to address climate change, one of the greatest human rights challenges of our times”.⁵⁴⁸ For the purpose of figuring out some recommendations that the

⁵⁴⁶ Paris Agreement, UNFCCC 21st Conference of the Parties, adopted 12 Dec 2015.

⁵⁴⁷ (Ibid.) Lewis B. (2018) Challenges Confronting a Human Rights-Based Approach to Climate Change.

⁵⁴⁸ Special Procedures of the UN Human Rights Council in an open letter to the parties to the UNFCCC, 17 October 2014.

international community could take under consideration for the development of a new improved human rights-based approach to climate change, the starting point is exactly the one underlined by the Special Procedures in the open letter: namely coherence between States' human rights obligations and their efforts to address climate change. In no other way, in fact, such goal of improving the connection between the two main observed worlds of climate change and human rights, which lies as well at the basis of the first main international agreement on climate change,⁵⁴⁹ could be reached in the future without coherence. Here lies, as well, a less-obvious and less-immediate aspect of a human rights-based approach to climate change, as it represents the old and the new, the conservative and the innovative, the traditional standards of international human rights law as applied to the new scientific and technical field of climate change: the outcome is a new hybrid framework of norms and duties which would provide for a new elasticity and improvement of both the two worlds object of our analysis. Basically, in the main international agreements on climate change, many steps towards the realization of a human rights-based approach to climate change have already been identified; it's less obvious, however, whether these steps have also been concretely taken. For the purpose of moving further to describe which are the objectives that the international community should agree to reach through the next climate negotiations with respect to human rights, a brief analysis of the already-identified steps towards the adoption of a human-rights oriented approach to climate change will now be provided. First of all, within the UN Framework Convention on Climate Change (UNFCCC), the Cancún Agreements underlined some important steps or 'goals' with regard to the necessity to intervene in limiting the negative consequences of climate change on human rights: among the most innovative goals, there were the adoption of mitigation measures aimed at establishing timely schedules for reducing human-induced GHG emissions over time and keeping the global temperature below 2C°, ⁵⁵⁰ as well as adaptation measures aimed at assisting vulnerable groups to adapt, by

⁵⁴⁹ In particular, these goal lies at the basis of the Cancún Agreements, reached in December 11, at the 2010 UNFCCC 16th Conference of the Parties (COP16).

⁵⁵⁰ This measure included the requirement of a review progress by 2015 on whether the goals identified needed to be broadened in the future on the basis of the best scientific knowledge at disposal.

taking coordinated actions, to the inevitable impacts of climate change. Moreover, the Agreements contemplated the goal of ensuring international transparency in all actions taken by the international community towards the realization of the global progress of reducing the planet's temperature below 2C°, and promoting as well the development of clean technologies in order to boost the efforts of addressing climate change. Steps were taken also from a financial point of view, foreseeing the possibility to adopt a Green Climate Fund in order to provide support and assist the developing countries in mitigating climate change and adapting to its impacts. One of the most innovative outcomings regarded the adoption of REDD+ mechanisms,⁵⁵¹ namely a set of safeguards aimed at guiding forests' activities for the purpose of mitigating climate change. This mechanism was contemplated as a form of protection of the many forests of the world, which are the major sources of carbon (and thus the most affected by human activities through deforestations for the purpose of burning fossil fuels), but they included as well some relevant provisions for the protection of human rights, such as the necessity for projects to respect the rights and knowledge of indigenous peoples and members of local communities including their participation in such projects.⁵⁵² However, despite all these goals and good intentions of assuming more responsibility with regard to the climate change implications on human rights, since 2010, the UNFCCC has made very few progresses in operationalizing human rights protection.⁵⁵³ As a consequence, much more work is required in order to put human rights at the center of political and negotiating agendas. This necessity has been evidenced as well at the successive Conference Of the Parties of the UNFCCC (COP) held in December 2014, where, in the last days of negotiations, some Parties called for more attention on human rights, including gender equality and the rights of indigenous people to be included in the next Paris climate agreement in 2015. However, despite these interventions of the Parties and the interventions as well of many international organizations and of the Special Procedures of the Human Rights

⁵⁵¹ Cancún Agreements, at Appendix I.

⁵⁵² (Ibid.) Cancún Agreements, at para 2(c), (d).

⁵⁵³ "*Climate Change, tackling the greatest human rights challenge of our times*", Recommendations for effective action on climate change and human rights, Paper by the Center for International Environmental Law and CARE International, published February 2015.

Council, the Paris Agreement finally included very little references to human rights in its negotiating text.⁵⁵⁴ Anyway, starting from the progresses made during the 2015 negotiations activated by the Paris Agreement towards the realization of climate goals in order to limit the negative impacts of climate change, some more important objectives to be reached in the future by the international community could be identified with regard to the necessity to intervene in limiting the negative consequences of climate change upon human rights: these objectives result from recommendations submitted both by the IBA (International Bar Association)⁵⁵⁵ and by 76 Independent Experts of the Special Procedures of the Human Rights Council⁵⁵⁶ to the UNFCCC Parties in order to call on the attention to fully integrate human rights into the post-2020 climate regime.⁵⁵⁷ A first recommendation regards the necessity to take urgent and ambitious action which could effectively limit the increase of the global temperature to no more than 1.5 C° (as pointed out by the Paris Agreement, which called for the necessity to keep it “well below 2 C° compared to pre-industrial levels”⁵⁵⁸ but for efforts to limit the increase to 1.5 C°) in addition to the necessity to take urgent action in order as well to provide for support to the needs of the most vulnerable and poor ones through the adoption of mitigation measures and resources in order to prevent most catastrophic impacts of climate change and through the supply of compensation for the climate-related harms which cannot be avoided: these measures require in particular an improvement in pre-2020 mitigation efforts.⁵⁵⁹ More specifically, the actions aimed at providing compensation for climate-related harms that cannot be avoided, rely on the idea that severe damages and irreversible losses on the lives, livelihoods, property and culture can’t be no longer avoided but yet they endanger the human rights of vulnerable groups and

⁵⁵⁴ (Ibid.) “*Climate Change, tackling the greatest human rights challenge of our times*”, Paper by the Center for International Environmental Law and CARE International, February 2015.

⁵⁵⁵ International Bar Association, “Achieving Justice and Human Rights in an Era of Climate Disruption” (July 2014).

⁵⁵⁶ UN OHCHR, Statement of the UN Special Procedures Mandate Holders on the occasion of Human Rights Day Geneva (Dec. 2014)

⁵⁵⁷ (Ibid.) “*Climate Change, tackling the greatest human rights challenge of our times*”, Paper by the Center for International Environmental Law and CARE International, February 2015.

⁵⁵⁸ Paris Agreement, UNFCCC 21st Conference of the Parties (COP21), adopted 12 Dec 2015

⁵⁵⁹ (Ibid.) “*Climate Change, tackling the greatest human rights challenge of our times*”, Paper by the Center for International Environmental Law and CARE International, February 2015.

individuals which contributed the less to climate change. Following this assumption, the Parties should recognize their obligations to compensate those who have been already affected by climate change and who are already experiencing loss and damage. Another recommendation, following the outcomes of the last two Chapters' analysis, regards the necessity to recognize that human rights obligations can be applied in the context of climate change, and must be fully integrated in the adoption and development of climate policies.⁵⁶⁰ In this regard, the IBA and the Special Procedures refer to the necessity for implementing Parties' obligations to protect human rights in all climate actions as a step towards the realization of a coherence among human rights and climate regimes. According to the UN Special Procedures, this would be necessary in order to ensure that the international community's response to climate change does not cause additional environmental harm and degradation.⁵⁶¹ However, it is important to consider that this outcome is based on the already existing obligations of the Parties to protect human rights, but that in order to implement and develop climate policies, and possible other measures and mechanisms under the UNFCCC in the light of a human rights-based approach, an additional outcome in that sense is necessary to come from the future climate negotiations. Another recommendation regards the idea to "establish a work program in human rights and climate change in order to monitor and assess the progress in integrating human rights in all aspects of climate action".⁵⁶² As suggested by the Special Procedures, the Parties to the UNFCCC should create a work program on the issue of human rights and climate change in order to present the issue in the next Conferences of the Parties' (COP) climate agenda. In fact, a work program would provide much more opportunities to focus both on the efforts who have been already done and on how to improve them with regard to the problem of respecting human rights in climate change issues. In the next climate agreements, Parties should adopt decisions regarding the establishment of next objectives and

⁵⁶⁰ (Ibid.) "*Climate Change, tackling the greatest human rights challenge of our times*", Paper by the Center for International Environmental Law and CARE International, February 2015.

⁵⁶¹ (Ibid.) UN OHCHR, Statement of the UN Special Procedures Mandate Holders on the occasion of Human Rights Day Geneva (Dec. 2014)

⁵⁶² (Ibid.) "*Climate Change, tackling the greatest human rights challenge of our times*", Paper by the Center for International Environmental Law and CARE International, February 2015.

actions to be undertaken to effectively integrate human rights in climate policy-making. In the same context, another recommendation would be to request opinions to the UN Special Procedures and to the UN High Commissioner on Human Rights on how to operationalize the protection of human rights in the climate policy making. In fact, in order for the UNFCCC to better realize which actions would be needed to in order to provide for a full protection of human rights in climate frameworks it could be useful to conduct, in consultation with the human rights independent experts and scholars, an analytical study with regard to “what is means to apply a human-rights-based approach to climate change”.⁵⁶³ This would install a mechanisms on sharing ideas and best practices on the ways in which a rights-based approach to climate change could be operationalized. Concretely this could be done 1) through the establishment of a work program who could ask for inputs on the matter of climate change and human rights to the bodies with the most long-standing experience in the field such as Human Rights Council and the OHCHR. 2) though a request submitted by the same Parties of the UNFCCC to the OHCHR to conduct a study on the matter. Both these strategies would help building consistency and coherence in the field of human rights and climate change, but would also provide legitimacy to these studies, as they would be undertaken under the UNFCCC. Finally, a last order of recommendations regards the necessity for the Parties to the UNFCCC to strengthen the role of individuals by ensuring them the effective participation in all decision-making processes held at all levels, in order to receive from individuals not only critical, but also effective and sustainable outcomes:⁵⁶⁴ in other words, this would mean providing these non-State actors the effective access to information, a full participation and the access to justice in decision making-processes, at all the local, regional, national and international levels. This would require the next COP to take decisions which could grant an equitable participation of groups and individuals in the development, implementation and

⁵⁶³ (Ibid.) “*Climate Change, tackling the greatest human rights challenge of our times*”, Paper by the Center for International Environmental Law and CARE International, February 2015.

⁵⁶⁴ (Ibid.) “*Climate Change, tackling the greatest human rights challenge of our times*”, Paper by the Center for International Environmental Law and CARE International, February 2015.

monitoring of policies and activities. In conclusion, as evidenced by the analysis provided, the steps which could be taken towards the full realization of human rights in all the climate related actions are many, and some of them would require a lot of work to be made by the international community as a whole. By now, only a small part of this major work has been done, and namely the recognition of the need to respect human rights in all climate related actions. Now it's time to implement this approach in practice. Anyway, looking at the rapidity at which the necessity of protecting human rights against climate change is being taken under consideration by the international community, we must proudly recognize that enormous steps have been taken since the very first beginning, when climate change was still "a mere unpopular alarm" coming from few little States. So, there is hope for the future outcomes which would result from the concrete acceptance of a stronger relationship existing between these two worlds, and which is sealed with the solemn recognition of a human rights-based approach to climate change.

CONCLUSION

It was the long gone 2007 when a group of few small island States, including, *inter alia*, the Maldives, Indonesia and the Philippines explicitly affirmed, and for the first time in an international agreement, that climate change has implications for the enjoyment of human rights and called for the attention of the UN Human Rights Bodies on the matter.⁵⁶⁵ That statement had the power to completely revolutionize the understanding of climate change as a purely scientific and environmental phenomenon. In fact, the Male' Declaration sparked the idea - at that time already observable at the practical level yet maybe too far from the traditional conception of human rights which it was attempting to approach - that there are many threats posed by climate change to the human rights of the developing countries and the world as a whole. Since that moment, this mere idea has been shaped and modelled and many actors have been trying to address it in a way which could have been accepted by the international community without too many compromises. Big steps have been taken and the progresses regarding the conceptualization of climate change and human rights as an *unicum* to address have been enormous compared to the origins of the Maldives' Declaration, where instead the issue of climate change negative effects' on human rights was just a "mere unpopular alarm" supported by very few States. The outcome of such progresses and processes of shaping the starting idea of climate change and its impacts on human rights, is that human rights and the framework at their basis became not only something to be protected against climate change, but a strategy for addressing it. This has been defined as a "human rights-based approach to climate change", and the way this approach conceives human rights is in fact not only by considering them as a 'goal' to reach or provide protection for, but also as a way of framing climate change and in particular with respect to the climate policies-making processes at the national and international levels. Human rights can in fact help achieving this result by shifting the attention on human impacts and by "putting a normative focus on

⁵⁶⁵ "Malé Declaration on the Human Dimension of Global Climate Change", adopted 14 November 2007.

human welfare”.⁵⁶⁶ As a consequence, human rights would be both the goal and the way for realizing it, so that they would be present at any stage of the protection and fulfillment of the rights. Nevertheless, there is still more to observe. In fact, the more the progresses in the field of human rights and climate change expand, the more they influence, shape and strengthen the system lying at the basis of the United Nations Framework Convention on Climate Change (UNFCCC) and the climate change policies. In this regard, the *climate justice*⁵⁶⁷ movement, launched with landmark cases such as the *Urgenda Climate Case*, and which is intended at shaping climate change and global warming not only as a mere environmental issue but rather as an ethical and political one, is playing as well an active role in helping the UNFCCC’s system re-thinking its principles of equity and ‘common but differentiated responsibilities’ in a rights-oriented way, through the use of human rights-based approaches to climate change.⁵⁶⁸ Therefore, as the rules on climate change provided by the climate conventions and agreements continue to evolve, they will as well continue to need to be informed by the human rights law framework. In this context, it is starting to be felt the increasingly necessity to adopt a framework in which human rights law could be used in an “harder sense”⁵⁶⁹ - and namely a system of human rights obligations applicable in the context of climate change – in order to allow vulnerable communities and individuals affected by climate change to claim that a given State has failed to comply with its human rights obligations as applied to climate change, and that this failure has given rise to a violation of an individual’s human rights, so that he/she/they can get justice and receive compensation for such violation.⁵⁷⁰ The various ways in which a human rights-based approach could be applied to climate change all offer an equally range of benefits, and understanding their potential is

⁵⁶⁶ Challenges Confronting a Human Rights-Based Approach to Climate Change. Author: Bridget Lewis.

⁵⁶⁷ As reported in Chapter III, climate justice helps shaping climate change and global warming as ethical and political issues rather than purely environmental. This objective is reached by relating the causes and effects of climate change to concepts of justice, and in particular environmental justice and social justice. Climate justice analyses concepts such as human rights, collective rights, and the historical responsibilities for climate change.

⁵⁶⁸ Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

⁵⁶⁹ (Ibid.) Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

⁵⁷⁰ (Ibid.) Restoring the Climate Change by Realizing Rights: the role of the International Human Rights System. Article by Edward Cameron and Marc Limon.

fundamental for optimizing their effectiveness. It will be up to the next international climate agreements on the climate agenda to adopt decisions in order to provide for a concretization of such important steps towards the realization of human rights-based approaches to climate change and to provide for international human rights mechanisms aimed at strengthening the global response to climate change. By now, the vulnerable countries such as the Maldives' still face a long way from the realization of their urgent requests to stabilize the global climate and address their needs with regard to the imminent impacts of climate change upon their communities. In this sense the 'end' of the problem of climate change still remains a far destination through a difficult and challenging path which needs in any case to be treaded in order to ensure that human rights are equally fulfilled and protected against all the dangers threatening their enjoyment. In this sense, fulfilling human rights, and placing human faces to the further challenges which will be presented to the international community by climate change, will foster more resilient and active societies to face such challenges with a new energy. Human activities lie at the origin of the world's decline, but this means human action can help to recover it.⁵⁷¹

⁵⁷¹ UN Secretary-General Antonio Guterres at Columbia University, 2, December 2020.

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